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# Chapter 1: The Subsidiarity Principle in the EU Treaties

## I. Introduction

The principle of subsidiarity raises ‘fundamental questions about the appropriate locus of political and legal authority within a complex and multiple-layered polity’.<sup>1</sup> Specifically, subsidiarity addresses the issue of the *exercise* of competences in areas shared by Member States and the European Union.<sup>2</sup> The purpose of the subsidiarity principle is ‘to arbitrate the tension between integration and proximity in all matters dealt with by the Union and its Member States’.<sup>3</sup> As a ‘constitutional safeguard of federalism’, subsidiarity aims at restraining the exercise of powers allocated to the EU.<sup>4</sup> In other words, subsidiarity decides whether, in a specific case in which the EU already has a competence, the EU should act or whether the action should be taken at the national level.<sup>5</sup>

This chapter offers an in-depth analysis of the ‘deliciously vague’ subsidiarity principle.<sup>6</sup> Section II describes the origin of the subsidiarity principle and its roots in German Basic Law. Section III discusses subsidiarity in Switzerland and the United States (US) as a principle connected to organisation of federal systems. Section IV then moves to the development of the subsidiarity principle within the EU legal order, first introduced by the Maastricht Treaty. This section elaborates on the guidelines that were established over time and the more recent focus on the procedural aspect of the principle. At this point, the relationship between the subsidiarity principle and the two other principles of Article 5(3) TEU are elaborated on. Section V then deals with the enforcement of the subsidiarity principle by the Court of Justice of the EU. Specifically, the limits and the recent trends in the Court’s case law are discussed together with the new ‘subsidiarity action’ introduced by the Lisbon Treaty. The final section, Section VI, provides the context for the establishment of the Early Warning System (EWS): the problem of broadening of EU competence and the insufficient democratic legitimacy of EU policies.

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<sup>1</sup> Gráinne de Búrca, ‘Re-appraising subsidiarity’s significance after Amsterdam’ Harvard Jean Monnet working paper series, 43.

<sup>2</sup> Akos G Toth, ‘Is Subsidiarity Justiciable?’ (1994) 19 European Law Review 268, 269.

<sup>3</sup> Koen Lenaerts, ‘The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism’ (1993) 17 Fordham International Law Journal 846, 848.

<sup>4</sup> Robert Schütze, *From dual to cooperative federalism: the changing structure of European law* (Oxford University Press 2009) 247.

<sup>5</sup> Akos G Toth, ‘The principle of subsidiarity in the Maastricht Treaty’ (1992) 29 Common Market Law Review 1079, 1082.

<sup>6</sup> Joseph H. H. Weiler, ‘The reformation of European constitutionalism’ (1997) 35 Journal of Common Market Studies 97, 127.

## II. Characteristics of the Subsidiarity Principle

### A. Origin of the Subsidiarity Principle

Many scholars see the roots of the modern notion of subsidiarity in Pope Pius XI's encyclical *Quadragesimo Anno* (1931).<sup>7</sup> In the encyclical, the Pope offers a principle of social order which at its core can be read as an expression of the principle of subsidiarity:

Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.<sup>8</sup>

Here we already find a preference for allocating responsibilities to the lower levels of organisation as long as these have the capability to exercise them effectively. This foreshadows the elements of subsidiarity in its modern use in the EU.

Having said that, there are also important differences between the European and the Catholic versions of subsidiarity. First, the former is narrower because it concerns democratic public bodies, while the latter deals with much broader collective entities and society as a whole.<sup>9</sup> Second, the EU subsidiarity principle can be viewed independently from the Catholic understanding. Even without *Quadragesimo Anno*, Europe might have arrived at a similar idea. Thus one can think of the EU subsidiarity principle as deriving from alternative political positions and not just from Catholic ideology.<sup>10</sup>

Other roots of the subsidiarity idea can be traced back to two German traditions on the structure of the state: federalism and liberalism.<sup>11</sup> The German federalist notion of the state focuses on the relationships between its different components and the functions they fulfil. Isensee finds in this tradition (eg, in the work of Althusius, von Humboldt, and Hegel) hints of

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<sup>7</sup> See for example Josef Isensee, *Subsidiaritätsprinzip und Verfassungsrecht: eine Studie über das Regulativ des Verhältnisses von Staat und Gesellschaft* (Duncker & Humblot 2001) 18ff. Deborah Z Cass, 'The word that saves Maastricht? The principle of subsidiarity and the division of powers within the European Community' (1992) 29 Common Market Law Review 1107, 1110.

<sup>8</sup> *Quadragesimo Anno* point 79, English translation available at [http://w2.vatican.va/content/pius-xi/en/encyclicals/documents/hf\\_p-xi\\_enc\\_19310515\\_quadragesimo-anno.html](http://w2.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno.html).

<sup>9</sup> Nicholas W Barber, 'The limited modesty of subsidiarity' (2005) 11 European Law Journal 308, 310.

<sup>10</sup> Ibid. See also Isensee (n 7) 71.

<sup>11</sup> Isensee (n 7) 35.

the idea of subsidiarity, without arguing for a direct expression of subsidiarity in this work.<sup>12</sup> More direct evidence for the presence of subsidiarity ideas as an organising principle can be found in the liberalist theory of the state. In the liberalist tradition, the state is legitimate only to the extent that it is organised according to the subsidiarity principle.<sup>13</sup> Nevertheless, the liberalist perspective arguably knows only the individual and the state and, as such, does not speak to intermediary levels of organisation.<sup>14</sup>

## **B. Subsidiarity in the German Basic Law**

The German Basic Law does not explicitly refer to subsidiarity as a principle. However, there is a strong case that the spirit of the principle entered the German constitution from the country's scholastic tradition and from there led to the inclusion of subsidiarity in EU law.

At the time of the creation of the Basic Law in 1949, the political and legal environment was receptive to the notion of subsidiarity. Indeed, a reference to the principle of subsidiarity was included in the draft constitution prepared by the Constitutional Convention at Herrenchiemsee in 1948, even though this reference was ultimately dropped.<sup>15</sup> There are several reasons for the removal. First, the religious heritage of the concept may have worried the drafters.<sup>16</sup> Second, some of the drafters may have been satisfied that Article 1 of the draft included a sufficient commitment against an overreaching state and thus believed that a further reference to subsidiarity was unnecessary at the time.<sup>17</sup>

Likewise, the final text of the Basic Law approved in 1949 did not formally include the subsidiarity principle.<sup>18</sup> However, this lack may be explained by the fact that the Basic Law was expected to be of a provisional nature, and thus the drafters may have steered clear of nascent legal concepts.<sup>19</sup> Overall, it can be argued that the forces behind the Basic Law sought to establish an order based on an ethical individualism that is also found in the subsidiarity principle, purposefully distancing the new German state from the collectivist state of the recent past.<sup>20</sup>

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<sup>12</sup> Ibid (n 7) 37.

<sup>13</sup> Ibid (n 7) 45.

<sup>14</sup> Ibid (n 7) 46.

<sup>15</sup> Ibid (n 7) 143.

<sup>16</sup> Ibid (n 7) 143.

<sup>17</sup> Ibid (n 7) 143.

<sup>18</sup> Ibid (n 7) 145.

<sup>19</sup> Ibid (n 7) 145.

<sup>20</sup> Ibid (n 7) 146.

Finally, the inherently federal structure of the German state under the new Basic Law strongly reflected the ideal of subsidiarity.<sup>21</sup> The component Länder of the new federal state had an interest in limiting the powers of the federal level and were able to imprint this view on the constitution through their close involvement in its creation and approval.<sup>22</sup>

Beyond indications that the drafters of the Basic Law may have been concerned with the notion of subsidiarity, there are also indications in the text of the constitution itself that support the case that the German Basic Law carried the subsidiarity principle from its religious roots toward modern times.<sup>23</sup> Most fundamentally, the federal structure of the German state is explicitly build up from below. Article 30 of the Basic Law concerning the sovereignty of the Länder assigns all state powers to the Länder unless specifically provided for otherwise in the Basic Law. In addition, there is a positive limited enumeration of powers at the federal level (Article 73 of the Basic Law) and a list of conditions that determine whether the Länder or the federal state should act in a given area (Article 72 of the Basic Law).

Initially, Article 72 of the Basic Law was drafted very broadly, requiring only that a law met certain conditions relating to ‘the uniformity of living conditions beyond the territory of any Land’ for the federal level to act. However, on judicial review, this notion was found to be nonjusticiable, because any given law could readily be drafted to meet this requirement.<sup>24</sup> In its modern version, in force since 1994, Article 72(2) of the Basic Law states that in the field of concurrent legislative competences, the Federation should act ‘if and to the extent that the establishment of equivalent living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest’. The newly added necessity clause requires the federal level to demonstrate a specific need to act for each new law. This amended provision echoes the subsidiarity principle and can be regarded as its first incorporation into constitutional law.<sup>25</sup> Under the new version of Article 72 of the Basic Law, the federal level has primacy in the exercise of competence shared with the Länder when the conditions of Article 72(2) of the Basic Law are fulfilled and the federal level decides to act. In that case, a matter is beyond the influence of the Länder.<sup>26</sup> However, Article 72(2) of the Basic Law sets out the specific conditions that the federal government is

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<sup>21</sup> Ibid (n 7) 147.

<sup>22</sup> Ibid (n 7) 147.

<sup>23</sup> Ibid (n 7) 223ff.

<sup>24</sup> Ibid (n 7) 230.

<sup>25</sup> Ibid (n 7) 358.

<sup>26</sup> Ibid (n 7) 359

required to meet for it to take action.<sup>27</sup> In addition, the Länder remain a valid alternative to the federal level if they can achieve the relevant objectives themselves, individually or acting jointly.<sup>28</sup> These two aspects of the German Basic Law are both reminiscent of counterparts in the implementation of the subsidiary principle in EU law. First, once the EU decides to act and meets the conditions to act under the subsidiarity principle, then the Member States can no longer regulate on their own. Second, there is no explicit requirement for the EU to act whenever the national level cannot achieve the objective sufficiently and where the objective would be better achieved at the EU level.

There are certain limits to the expression of subsidiarity in Article 72(2) of the Basic Law. First, the Basic Law addresses only the division of powers between the federal and the state, ignoring, for example, municipalities and civic organisations.<sup>29</sup> In contrast, the regional and local levels are explicitly recognised in the Lisbon Treaty as valid levels on which to exercise competences, highlighting the multi-layered nature of the national level itself.<sup>30</sup> Second, Article 72(4) of the Basic Law does not automatically return competences to the Länder if and when the conditions of Article 72(2) of the Basic Law are no longer fulfilled, but leaves this to the discretion of the federal level.<sup>31</sup> This discretion is not included in the EU subsidiarity provisions.

Article 72(2) of the Basic Law demands a dual test reviewing whether there is a case for federal legislation in addition to whether the legislation goes beyond what is necessary to achieve the objectives set in that provision.<sup>32</sup> The Basic Law foresees a judicial safeguard of the subsidiarity principle in the form of review by the Federal Constitutional Court on the application of the Bundesrat or a Land.<sup>33</sup> In contrast, there is no political safeguard of subsidiarity. An initiative to give the Bundesrat the role as a parliamentary watchdog of the subsidiarity principle did not gain the necessary support.<sup>34</sup>

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<sup>27</sup> Ibid (n 7) 359.

<sup>28</sup> Ibid (n 7) 360.

<sup>29</sup> Ibid (n 7) 360.

<sup>30</sup> de Búrca (n 1) 16.

<sup>31</sup> Isensee (n 7) 360.

<sup>32</sup> Greg Taylor, 'Germany: The subsidiarity principle' 4 *International Journal of Constitutional Law* 115, 120.

<sup>33</sup> Article 93 (2a) of the Basic Law. This judicial safeguard did not exist before 1994 since both the German scholarship and the Federal Constitutional Court perceived Article 72(2) of the Basic Law as expressing a political decision of the federal legislator to legislate. See Markus Rau, 'Subsidiarity and judicial review in German federalism: the decision of the Federal Constitutional Court in the Geriatric Nursing Act Case' 4 *German Law Journal* 223, 227.

<sup>34</sup> Deutscher Bundestag, Bericht der Gemeinsamen Verfassungskommission, Drucksache 12/6000, 05.11.93, 33.

There is by now a significant body of jurisprudence produced by the Federal Constitutional Court on the enforcement of the subsidiarity principle. Nonetheless, the Court's interpretation of the tests involved in Article 72(2) of the Basic Law remains unclear, echoing some of the issues with the CJEU's jurisprudence on subsidiarity. For example, no precise meaning has been given by the Court to the terms 'equal living conditions' or 'national interest'.<sup>35</sup> Nonetheless, there are several cases in which the Court has found federal legislation incompatible with the subsidiarity principle, eg, in the 'Junior Professors' case.<sup>36</sup> These decisions led to an amendment of Article 72(2) of the Basic Law in 2006 that restricted its applicability to a limited number of areas of concurrent competence,<sup>37</sup> such as, for example, the residence of foreign nationals, public welfare, law relating to economic matters (mining, industry, trade, commerce, etc), and regulation of educational training or state liability.

It is notable that after German law had served as inspiration for the EU's inclusion of subsidiarity in the Maastricht Treaty, the subsidiarity principle found its way back from EU law into German law. Specifically, according to Article 23 of the Basic Law adopted in 1992, Germany participates in the development of an EU 'that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law'. Germany is thus reimporting the subsidiarity principle to the German constitutional system.<sup>38</sup>

Article 23 of the Basic Law enumerates the subsidiarity principle and presents an important tie between German law and EU law. It regulates the way Germany acts within the EU, for example, requiring the representatives of Germany in the EU to adhere to the subsidiarity principle in both the division and the exercise of competences at the EU level.<sup>39</sup> In addition, it commits Germany to an EU based on subsidiarity, reemphasising the importance of the principle for German constitutional law.<sup>40</sup> The inclusion of subsidiarity in the EU treaties directs new attention to Germany's own commitment to subsidiarity in the organization of the German federal state.<sup>41</sup>

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<sup>35</sup> Rau (n 33) 233.

<sup>36</sup> Greg Taylor, 'Germany: A slow death for subsidiarity?' 7 *International Journal of Constitutional Law* 139, 143.

<sup>37</sup> *Ibid* 146.

<sup>38</sup> Isensee (n 7) 334.

<sup>39</sup> *Ibid* (n 7) 371.

<sup>40</sup> *Ibid* (n 7) 371.

<sup>41</sup> *Ibid* (n 7) 334.

### III. Subsidiarity in Other Legal Systems

Subsidiarity as an explicit constitutional principle has been ascribed a marginal role in federal constitutions.<sup>42</sup> It is not explicitly written into the Australian, Brazilian, Canadian and US Constitutions.<sup>43</sup> This has been explained by the existence of other means to deal with the question of which level of government does what such as the enumeration of powers.<sup>44</sup> For example in Canada, the Constitution Act of 1867 provides a distribution of legislative competences between the federal and provincial governments, which includes a list of areas of exclusive jurisdiction of the federal legislature and a list of areas of exclusive jurisdiction of provincial legislators, in addition to areas of joint jurisdiction.<sup>45</sup> Nonetheless, the Canadian federal legislature can also legislate in areas not explicitly listed ‘for the peace, order and good government of Canada’ which can lead to excessive centralisation of power.<sup>46</sup> The principle of subsidiarity is as such not enshrined in the text of the Constitution Act.<sup>47</sup> Yet, as observed by one commentator, subsidiarity has been implicitly present in the case law of the Supreme Court of Canada, most visibly in a national concern doctrine and a provincial inability test.<sup>48</sup> More recently subsidiarity was directly invoked by the Supreme Court of Canada as a constitutional principle linked to the balance of power of the two levels of government.<sup>49</sup> The Canadian subsidiarity differs from the EU approach in various ways. Subsidiarity in Canada can apply in areas where the federal legislature has no explicit competence at all, while in the EU subsidiarity only applies in areas of shared competence. In Canada, subsidiarity works only upwards, meaning that it does not allow the transfer from the federal down to the provincial level; finally, the Canadian federal legislature is not obliged to proof the inability to act of the provinces.

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<sup>42</sup> Markus Jachtenfuchs and Nico Krisch, ‘Subsidiarity in global governance’ 79 *Law & Contemp Probs* 1, 10. For a comparative law perspective on subsidiarity see also Werner Vandenbruwaene, ‘The Judicial Enforcement of Subsidiarity. The comparative quest for an appropriate standard’ in Patricia Popelier, Armen Mazmanyan and Werner Vandenbruwaene (eds), *The Role of Constitutional Courts in Multilevel Governance* (Intersentia 2013)

<sup>43</sup> Jachtenfuchs and Krisch.

<sup>44</sup> Ibid.

<sup>45</sup> Sections 91-95 of Canadian Constitution Act.

<sup>46</sup> Section 91 of Canadian Constitution Act.

<sup>47</sup> Eugénie Brouillet and Bruce Ryder, ‘Key Doctrines in Canadian Legal Federalism’ in *The Oxford Handbook of the Canadian Constitution* (2017) 425.

<sup>48</sup> Eugénie Brouillet, ‘Canadian Federalism and the Principle of Subsidiarity: Should We Open Pandora's Box?’

<sup>49</sup> 54 *The Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference* 601, 618. See also Andreas Follesdal and Víctor Muñoz Fraticelli, ‘The Principle of Subsidiarity as a Constitutional Principle in the EU and Canada’ 10 *Les ateliers de l’éthique/The Ethics Forum* 89.

<sup>49</sup> Brouillet (n 48) 626-631.



The following sections analyse the understanding of subsidiarity in the US and Switzerland, their enforcement and safeguards. Some comparisons are drawn with the approach to subsidiarity in the EU.

### **A. Subsidiarity in Switzerland**

In Switzerland, subsidiarity is explicitly enshrined in the country's constitution. The cantons exercise all powers of government except for those that are vested in the federation by the Constitution.<sup>50</sup> The Swiss Constitution foresees that '[t]he principle of subsidiarity must be observed in the allocation and performance of state tasks'.<sup>51</sup> The principle of subsidiarity, together with the principle of municipal autonomy, underscores the importance of subnational government in Switzerland.<sup>52</sup>

While no safeguard procedure similar to the EWS has been introduced in Switzerland, other mechanisms are in force that might be seen as political safeguards of federalism.<sup>53</sup> For example, representatives of the Cantons directly make up the Council of States, the Upper House of the Swiss Federal Assembly.<sup>54</sup> In addition, the Swiss Federal Constitution requires a referendum for constitutional amendments, for the accession of Switzerland to international organisations, and for emergency federal acts that do not have a constitutional basis and that are valid for more than one year. Such a referendum requires a double majority of votes of both 'the People and cantons' adding another layer of protection to the power of the lower unit of government.<sup>55</sup> Furthermore, the cantons can directly petition for legislation and also block federal legislation if at least eight cantons support the effort. For example, in 2003, eleven cantons successfully triggered this mechanism against a proposed tax reform that reduced the tax revenues of cantons.<sup>56</sup> Finally, while the Swiss Constitution does not provide for judicial review of the constitutionality of federal laws, such laws can be challenged in a referendum if at least 50,000 citizen petition for it.<sup>57</sup>

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<sup>50</sup> Art. 3 and 42 of Swiss Constitution.

<sup>51</sup> Art 5a of Swiss Constitution.

<sup>52</sup> Andreas Ladner, 'Switzerland: Subsidiarity, Power-Sharing, and Direct Democracy', 201.

<sup>53</sup> On the interparliamentary cooperation in Switzerland see Katarzyna Granat, 'National Parliaments as Political Safeguards of Federalism: Interparliamentary Cooperation in the EU, US and Switzerland' in Davor Jančić (ed), *National Parliaments after the Lisbon Treaty and the Euro Crisis Resilience or Resignation?* (Oxford University Press 2017) 273.

<sup>54</sup> Art 150 of the Swiss Constitution.

<sup>55</sup> Art 140(1) of the Swiss Constitution. The 'double majority' means the majority of the voters and the majority of 12 out of 23 votes (there are 26 cantons, but six of them count as half-cantons and have half a vote).

<sup>56</sup> Wolf Linder and Isabelle Steffen, 'Swiss Confederation' in Katy Le Roy and Cheryl Saunders (eds), *Legislative, Executive, and Judicial Governance in Federal Countries* (McGill-Queen's Press 2006) 308.

<sup>57</sup> Art 141 of the Swiss Constitution.

## B. Subsidiarity in the US

Contrary to the Swiss Constitution, the subsidiarity principle is not explicitly mentioned in the Constitution of the United States. Nonetheless, it can be argued that subsidiarity is ‘the key theoretical concept underlying a general theory of federalism’ and thereby a key part of the American experiment in form of the federal power principle.<sup>58</sup> The ‘Virginia Plan’ drafted by Madison and put forward during the Constitutional Convention of 1787 framed the powers of the national government as ‘to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation.’<sup>59</sup> This phrasing recalls the notion of lower level insufficiency that underlies the application of the subsidiarity principle in the EU today. Despite this prominent inclusion in the early deliberations on the Constitution, the subsidiarity principle did not enter the final draft. It was instead replaced with the explicit enumeration of federal powers in Article I, Section 8.

Despite its formal omission in the wording of the Constitution, there is an active debate surrounding whether and to what extent the subsidiarity principle operates in the US federal system. Bermann makes a powerful case for the view that subsidiarity is not being respected in the US as a procedural or jurisdictional principle. One part of his case rests on extent to which Congress is ‘limited in any significant way out of respect for the states’ capacity to accomplish the federal government’s general objectives’ in a field that falls within Congress’ remit.<sup>60</sup> Here, it is concluded that while there are areas where Congress may leave for example the implementation of regulations to the states (‘cooperative federalism’), overall it has not developed structured adherence to the subsidiarity principle in practice.<sup>61</sup> If the US Congress does not appear to apply the principle of subsidiarity in its legislative process, there may be space for the Supreme Court to enforce it. However, here it is underlined that the Court has ‘denied itself a role in enforcing subsidiarity’ despite having possibly the tools to do so under the Interstate Commerce Clause.<sup>62</sup>

In place of subsidiarity, the US system is seen to rely on the political process instead to protect the rights and interests of the states and lower levels of government. An influential view

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<sup>58</sup> Daniel Halberstam, ‘Federalism: Theory, Policy, Law’ in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 585.

<sup>59</sup> Max Farrand (ed), *The records of the federal convention of 1787* (Yale University Press 1911) 20.

<sup>60</sup> George A Bermann, ‘Taking subsidiarity seriously: federalism in the European Community and the United States’ (1994) 94 *Columbia Law Review* 331, 404.

<sup>61</sup> *Ibid* 416.

<sup>62</sup> *Ibid* 417.

by Wechsler sees sufficient political safeguards in place in the US to protect the states' interests.<sup>63</sup> These consist of the following main elements: first, a 'burden of persuasion on those urging national action'.<sup>64</sup> Second, the States' involvement in the federal government itself through elections of representatives in electoral districts formed within the states<sup>65</sup> and the electoral college's role in selecting the president.<sup>66</sup> Third, the structure of the Senate which awards each State two senators arguably amplifies their power.<sup>67</sup> Finally, due to the Electoral College Wechsler also sees the US president a necessarily 'responsive to local values that have large support within the states'.<sup>68</sup> The extent of these safeguards and their ability to constrain the federal government has been challenged but Wechsler's main argument found its way into the Supreme Court's decision in the *Garcia v. San Antonio Metropolitan Transit Authority* case.<sup>69</sup>

In addition to the structural safeguards described by Wechsler, legal and political scholarship has identified additional political safeguards of federalism in the role and incentives of political parties<sup>70</sup> and in the importance of state level implementation of federal laws. The latter is illustrated in the extent to which the Affordable Care Act of 2010 was implemented to various degrees by the States allowing them to 'limit or shape the federalization of government functions'.<sup>71</sup> Finally, there are 'informal political safeguards of federalism' through which states can influence federal policy<sup>72</sup>, including for example through interparliamentary cooperation amongst the state legislatures.<sup>73</sup> Overall, it is notable that

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<sup>63</sup> Herbert Wechsler, 'The political safeguards of federalism: The role of the states in the composition and selection of the national government' *Columbia Law Review* 543, 559. See a contrasting view claiming that judicial review is necessary to maintain and reinforce the political safeguards of federalism in Lynn A Baker, 'Putting the safeguards back into the political safeguards of federalism' 46 *Villanova Law Review* 951.

<sup>64</sup> Wechsler (n 63) 545.

<sup>65</sup> Art I, Section 2 of the US Constitution and Clause 1 of 17th Amendment to the US Constitution.

<sup>66</sup> Art II, Section 1 of the US Constitution.

<sup>67</sup> Wechsler (n 63) 547.

<sup>68</sup> *Ibid* (n 63) 558.

<sup>69</sup> *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S 528 (1985). See fn 11 of the judgement. However, the dissenting opinion of Justice Powell, joined by Chief Justice Rehnquist and Justice O'Connor, noted that Wechsler's view of sufficient political safeguards did not reflect the current state of affairs.

<sup>70</sup> Larry D Kramer, 'Putting the politics back into the political safeguards of federalism' *Columbia Law Review* 215, 278ff. See also Jenna Bednar, 'The Robust Federation' Cambridge University Press, 116. On political parties as political safeguards see also Shannon Jenkins and Douglas D Roscoe, 'Parties as the political safeguards of federalism: The impact of local political party activity on national elections' 44 *Publius: The Journal of Federalism* 519, 537.

<sup>71</sup> Abbe R Gluck, 'Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists' Gamble' 81 *Fordham L Rev* 1749, 1768.

<sup>72</sup> John D Nugent, 'The Informal Political Safeguards of Federalism' (Midwest Political Science Association, Chicago, Ill, April 27-30, 2000) 6. This notion is further elaborated on in John D Nugent, *Safeguarding federalism: How states protect their interests in national policymaking* (University of Oklahoma Press 2012) 54ff.

<sup>73</sup> Granat (n 53) 269.

‘federal law [is] the exception and not the rule. [...] many areas of law remain mostly at the state level, even after 220 years of American federalism.’<sup>74</sup>

In contrast to Bermann and others who see no application of subsidiarity in the US and focus on political safeguards of states’ rights, other scholars perceive the subsidiarity principle as an organizing principle that plays an active role in the US. These scholars argue that the US system has been infused with subsidiarity considerations from the beginning, and the case law of the US Supreme Court on Congress’s enumerated powers, the dormant Commerce Clause; intergovernmental immunities; pre-emption; federal jurisdiction suggests there is judicial enforcement of subsidiarity.<sup>75</sup> For example, they point to new vigour in restraining the federal government since the 1990s embodied in the *United States v. Lopez* case in which the US Supreme Court struck down the federal Gun Free School Zones Act but allowed similar laws at state level, as well as some newer case law, such as *National Federation of Independent Businesses v. Sebelius* case, where the majority of the justices found that the individual mandate requiring that uninsured individuals buy health insurance was not a proper exercise of Congress’ powers under the Commerce Clause. Together these cases indicate that the US Supreme Court can offer a safeguard for states through the Commerce Clause and the Necessary and Proper Clause under the Jones & Laughlin Steel doctrine that finds that Congress can act on intrastate activities only if these ‘*substantially* burdened interstate commerce’.<sup>76</sup> It is however worth noting that these arguments tend to deal with questions of allocations of powers and how subsidiarity may guide such decisions. In the EU context, the application of the subsidiarity principle is restricted to such areas that fall in the arena of shared competences and thus focusses primarily on the exercise of powers.<sup>77</sup>

#### **IV. Subsidiarity in the EU Treaties**

##### **A. Historical Development**

The Treaty of Rome of 1957 contained the first traces of the subsidiarity principle.<sup>78</sup> Some of its provisions, especially Articles 100 and 235 EEC, concern the distribution and exercise of

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<sup>74</sup> Steven G. Calabresi and Lucy D. Bickford, ‘Federalism and Subsidiarity: Perspectives from U.S. Constitutional Law’ 55 *Nomos* 123, 138.

<sup>75</sup> *Ibid* 158.

<sup>76</sup> *Ibid* 149.

<sup>77</sup> Vicki C Jackson, ‘Subsidiarity, the Judicial Role, and the Warren Court’s Contribution to the Revival of State Government’ 55 *Nomos* 190, 192.

<sup>78</sup> Lenaerts (n 3) 852. See also Communication of the Commission to the Council and the European Parliament on the principle of subsidiarity, 27.10.1992, SEC(92)1990

competences between the Community and the Member States and explore possible approaches and criteria that are reminiscent of the later subsidiarity principle such as conditions setting out necessity for the EU to act.<sup>79</sup> Moreover, directives issued under Article 189 EEC incorporated some aspects of subsidiarity: the Community level established the binding objective leaving to the Member States the choice of form and methods for their implementation.<sup>80</sup> These provisions are marginal, however, and cannot really be seen as evidence of the subsidiarity principle in the Rome Treaty.<sup>81</sup>

In 1984, an early draft proposal for an EU treaty (the ‘Spinelli draft’) adopted by the EP included a concept of the subsidiarity principle. Specifically, in cases of concurrent competence, the EU was to ‘carry out those tasks which may be undertaken more effectively in common than by the Member States acting separately, in particular those whose execution requires action by the Union because their dimension or effects extend beyond national frontiers’.<sup>82</sup>

The idea of subsidiarity was first introduced in the Treaty text by the Single European Act of 1987, where it concerned Community action in the area of environmental policy and limited Community action in that field to cases in which the objectives of the policy can be better achieved at the Community level than at the level of individual Member States.<sup>83</sup> However, the application of subsidiarity in the field of environmental policy has been questioned since this area especially demanded action at the EU or international level.<sup>84</sup>

A number of reasons spoke in favour of the introduction of the subsidiarity principle in the EU. First, subsidiarity was seen as a response to the lack of a clear division of different types of competence in the treaties.<sup>85</sup> The second reason built upon the first: in the uneasy cases of deciding upon the limits of EU powers, subsidiarity was perceived as a complementary criterion of ‘better’ achieving the objective.<sup>86</sup> Third, the aim of subsidiarity was to prevent ‘excessive centralisation’ occurring through treaty amendments, jurisprudence, and

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<sup>79</sup> Christian Calliess, *Subsidiaritäts- und Solidaritätsprinzip in der Europäischen Union* (1996) 31-35.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> Art. 12(2) of the Draft Treaty establishing the European Union, OJ C 77/33 1984.

<sup>83</sup> Art 130r (4) EEC.

<sup>84</sup> Toth, ‘The principle of subsidiarity in the Maastricht Treaty’ 1092.

<sup>85</sup> Paul Craig, ‘Subsidiarity: A political and legal analysis’ (2012) 50 JCMS: Journal of Common Market Studies 72.

<sup>86</sup> Ibid 73.

harmonization.<sup>87</sup> Finally, subsidiarity was supposed to boost ‘pluralism and the diversity of national values’.<sup>88</sup>

The Maastricht Treaty, in Article 3b EC,<sup>89</sup> as first provided the fully-fledged formulation of the subsidiarity principle:

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Subsidiarity became a general principle applicable to all policy areas of the treaty outside of the exclusive competence of the Community.<sup>90</sup> In addition, the Maastricht Treaty articulated a democratic angle of the subsidiarity principle, by referring in the preamble and Article A TEU to taking decisions ‘as closely as possible to the citizen’.<sup>91</sup>

The principle of subsidiarity was greeted as ‘an important, if undervalued’ part of the relation between Community and Member States and a form of division of power between them.<sup>92</sup> However, at the same time it was seen as a step back, weakening the Community and slowing down European integration.<sup>93</sup> Although it was said that even without subsidiarity, ‘one could [also] have lived quite happily and in peace in the European home’, subsidiarity remained a constitutional principle of EU law.<sup>94</sup>

The Maastricht formulation of the subsidiarity principle became the basis for its wording in the ill-fated Constitutional Treaty and of today’s subsidiarity in the Lisbon Treaty.<sup>95</sup> The current Article 5(3) TEU reads as follows:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed

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<sup>87</sup> Ibid 73.

<sup>88</sup> Ibid 73.

<sup>89</sup> Later renumbered as Article 5(2) EC by the Amsterdam Treaty.

<sup>90</sup> Gráinne de Búrca, ‘The principle of subsidiarity and the Court of Justice as an institutional actor’ (1998) 36 *Journal of Common Market Studies* 217, 218.

<sup>91</sup> Ibid 219.

<sup>92</sup> Cass (n 7) 1134.

<sup>93</sup> Toth, ‘The principle of subsidiarity in the Maastricht Treaty’ 1105.

<sup>94</sup> Pierre Pescatore, ‘Mit der Subsidiarität leben’ in Ole Due, Marcus Lutter and Jürgen Schwarze (eds), *Festschrift für Ulrich Everling* (Nomos 1995) 1094.

<sup>95</sup> Article I-11(3) of the Constitutional Treaty. See Nicholas W Barber, ‘Subsidiarity in the Draft Constitution’ (2002) 11 *European Public Law* 197.

action cannot be sufficiently achieved by the Member States, *either at central level or at regional and local level, but can rather*, by reason of the scale or effects of the proposed action, be better achieved at Union level (emphasis added).

There is also a new subparagraph:

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

This new paragraph and the difference it makes for the application of the subsidiarity principle for EU institutions is discussed separately in Chapter 2. Besides this addition of the EWS into the text of Article 5(3) TEU, two differences between the Maastricht and the Lisbon subsidiarity are visible: a substantive one and a textual one. In terms of substance, the new subsidiarity formula has an added value because of its reference to the sufficiency of national action at ‘central level or at regional and local level’. The Maastricht wording of the subsidiarity principle, by mentioning only the Community and Member State levels ‘[did] not reflect the philosophy of allowing smaller units to define or achieve their own ends’.<sup>96</sup> Regarding the textual change, the subsidiarity principle in the Maastricht Treaty combined the two parts of the subsidiarity test: first, that the objectives of the proposed action cannot be sufficiently achieved by the Member States, and second, that they can therefore be better achieved by the Community. The Maastricht Treaty used the linking phrase ‘and can therefore’, whereas its Lisbon Treaty version uses the formula ‘but can rather’. How should this change thus be read? It has been suggested that ‘and can therefore’ in the Maastricht version implied that the negative criterion acted as an independent criterion of equal importance relative to the positive one.<sup>97</sup> The Lisbon version ‘but can rather’ seems to imply a stronger causal connection between the two. Yet, as they are different tests, it is unclear how the ‘but’ can be read in any way other than ‘and’. The Edinburgh Declaration and the Amsterdam Protocol, discussed below, both state that Community action has to satisfy both limbs of the subsidiarity principle.<sup>98</sup>

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<sup>96</sup> de Búrca, ‘Re-appraising subsidiarity’s significance after Amsterdam’ (n 1) 19.

<sup>97</sup> In German ‘und daher’. Calliess (n 79) 97.

<sup>98</sup> Edinburgh Declaration at 18 and Art 5 of Amsterdam Protocol.

## B. Concepts of Subsidiarity

Conceptually, one can distinguish between material and procedural subsidiarity.<sup>99</sup> The latter concerns a number of procedural conditions that EU action needs to implement in order to be seen as compatible with the subsidiarity principle.<sup>100</sup> The material dimension of subsidiarity can be verified from two angles inherent in the wording of Article 5(3) TEU: the national insufficiency test and the comparative efficiency test.<sup>101</sup> Under the first test, the EU can act only when the proposed action cannot be sufficiently achieved at the national level. This concerns the inadequacy of means at a Member State's disposal for achieving the objectives of the proposed action.<sup>102</sup> The second test demands that the EU shall act if the objectives of the proposed action can rather 'by reason of the scale or effects of the proposed action, be better achieved at Union level'. In other words, the EU should not act 'unless it could *better* achieve the objectives of the proposed action'.<sup>103</sup>

The tests have been labelled in various ways. One way of describing the components of material subsidiarity is as 'negative' and 'positive' criteria.<sup>104</sup> The 'negative criterion' concerns the insufficiency of Member State action, whereas the 'positive criterion', to be checked only if the first is confirmed, implies a comparative cost-benefit analysis at the different levels of government (including the 'null option' of EU inaction).<sup>105</sup> Other reading of Article 5(3) TEU indicates that insufficiency of national action refers to the 'Member State's sense of self-government, and what it believes it can do itself. This goes to wider issues than legal effectiveness such as how far a measure forms part of a wider valued tradition'.<sup>106</sup> The second test inherent in the subsidiarity principle is a 'federal' one: 'whether one central measure would be more effective than twenty-eight different ones'.<sup>107</sup>

The national insufficiency test asks whether an objective can be achieved sufficiently by the Member States. The question here is whether passing the test requires all, some, or only a

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<sup>99</sup> Antonio Estella De Noriega, *The EU principle of subsidiarity and its critique* (Oxford University Press 2002) 105.

<sup>100</sup> Ibid. See further Section IV in this chapter.

<sup>101</sup> Schütze (n 4) 250.

<sup>102</sup> Koen Lenaerts, 'Subsidiarity and Community competence in the field of education' (1994) 1 *Columbia Journal of European Law* 1, 22. According to the Commission this test, which it labels 'comparative efficiency test' includes also lack of financial means. See Communication of the Commission to the Council and the European Parliament on the principle of subsidiarity, 27.10.1992, SEC(92)1990, 10.

<sup>103</sup> Schütze (n 4) 250.

<sup>104</sup> Calliess (n 79) 94.

<sup>105</sup> Ibid (n 79) 103.

<sup>106</sup> Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union law: cases and materials* (Cambridge University Press 2014) 395.

<sup>107</sup> Ibid.



single Member State to be in a position to achieve the objective and whether this includes Member States' operating jointly or only acting individually. One interpretation concludes that it needs to be checked whether the objective of the measure can be achieved through the unilateral action of a single, multiple, or all the Member States' acting independently.<sup>108</sup> Arguably smaller Member States may lack financial or other resources to achieve the objective sufficiently, and in such cases, limits on the autonomy of larger Member States in order to achieve an objective at the EU level could then be justified.<sup>109</sup> A different reading proposes that the EU can act if one or more Member States do not have adequate means.<sup>110</sup> In practice, the first interpretation appears to be consistent with the second one for many EU proposals. For example, the objective of the proposal on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings states as its objective 'common minimum rules for certain aspects of the right to presumption of innocence'.<sup>111</sup> If a single Member State was unable to adopt these standards, the overall objective would be violated, and thus the proposal would pass the national insufficiency test.

Another question is if the subsidiarity principle bars the EU from acting when Member States could achieve the objective by acting in a form of an intergovernmental cooperation. The textual interpretation of the Maastricht Treaty permitted the conclusion that the EU should not act in such a case; however, such an approach would not boost the process of EU integration.<sup>112</sup> The Treaty of Lisbon abolished the three-pillar structure in favour of creating the EU, yet the intergovernmental method is maintained for the Common Foreign and Security Policy and in the area of police and judicial cooperation in criminal matters in which Member States still possess significant powers. Enhanced cooperation can be undertaken only as 'a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole'.<sup>113</sup> Therefore, to answer the initial question of whether the EU should not act when Member States could proceed in a form that is binding only for a limited group of them, it seems that this is only a further possibility in cases allowed by the Treaty in which Member States could not agree in the Council.<sup>114</sup>

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<sup>108</sup> Calliess (n 79) 99.

<sup>109</sup> David Edward, 'Subsidiarity as a Legal Concept' in Pascal Cardonnel, Allan Rosas and Nils Wahl (eds), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart 2012) 100.

<sup>110</sup> Lenaerts, 'Subsidiarity and Community competence in the field of education' (n 102) 22.

<sup>111</sup> COM(2013) 821.

<sup>112</sup> Toth, 'The principle of subsidiarity in the Maastricht Treaty' (n 5) 1099.

<sup>113</sup> Art 20(2) TEU.

<sup>114</sup> See Chapter 3.

### **C. Guidelines for the Application of the Subsidiarity Principle**

Although the two tests inherent in the subsidiarity principle have not changed since the Maastricht Treaty, over time, EU institutions adopted a number of recommendations for the application of this principle. In December 1992, the European Council meeting in Edinburgh prepared guidelines for the implementation of the subsidiarity principle ‘to increase transparency and openness in the decision-making process of the Community’.<sup>115</sup> Those guidelines were laid down in the ‘Overall Approach’ annexed to the European Council’s conclusions. Subsidiarity is labelled here as a ‘dynamic concept’ working both ways: to expand and restrict (or discontinue) Community action depending on the circumstances.<sup>116</sup> The ‘Overall Approach’ provided that when addressing the subsidiarity question, ‘should the Community act?’, the Community action has to fulfil at least one of the following conditions. First, ‘the issue under consideration has transnational aspects which cannot be satisfactorily regulated by Member States’.<sup>117</sup> Second, ‘actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty . . . or would otherwise significantly damage Member States’ interests’. At this point, the ‘Overall Approach’ gives some examples of Treaty requirements that could be at stake: the need to correct distortion of competition, avoidance of disguised restrictions on trade, and strengthening of economic and social cohesion. The third guideline conditioned compliance with subsidiarity on the ‘clear benefits [of Community action] by reason of its scale or effects compared with action at the level of Member States’.<sup>118</sup> Moreover, harmonisation of national laws was compliant with subsidiarity only when harmonisation was necessary to achieve a Treaty objective. A common position of the Member States in relations with third countries (countries outside the EU) as such could not justify a Community action. Finally, the ‘Overall Approach’ provided that the subsidiarity reasoning had to be ‘substantiated by qualitative or, wherever possible, quantitative indicators’.<sup>119</sup>

As a compromise between Germany and the United Kingdom (UK) (both supporters of accommodating subsidiarity in the treaties) on the one hand, and France together with some southern Member States (in favour of mentioning the subsidiarity principle only in the

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<sup>115</sup> European Council in Edinburgh, 11-12 December 1992, Conclusions of the Presidency (Edinburgh Declaration) 2.

<sup>116</sup> Conclusions of the Presidency, Overall Approach to the Application by the Council of the Subsidiarity Principle and Article 3b TEU, Annex 1 to Part A, (Overall Approach) 16.

<sup>117</sup> Ibid 19.

<sup>118</sup> Ibid.

<sup>119</sup> Ibid.

preamble) on the other, Protocol No. 30 ‘on the application of the principles of subsidiarity and proportionality’ was added to the Amsterdam Treaty.<sup>120</sup> The Amsterdam Protocol borrowed the idea of subsidiarity as a ‘dynamic concept’ from the Edinburgh Conclusions and restated that compliance with subsidiarity must be demonstrated by ‘qualitative or, wherever possible, quantitative indicators’.<sup>121</sup> In comparison, however, the ‘General Approach’ distinguished quite clearly among the three legal concepts within Article 3b EC: principles of attribution of power, subsidiarity, and proportionality. For example, it placed the provisions on the form of action (choosing directives over regulations and framework directives over detailed measures) and on the consideration of financial and administrative burdens in the legislative process under the proportionality principle (‘nature and extent of Community action’).<sup>122</sup> The Amsterdam Protocol repeated that same recommendation, however, without a direct connection either to the subsidiarity or proportionality principle. In this way, the protocol created a link between the two principles.<sup>123</sup> This linkage, or, rather, confusion of the two principles is visible in the practice of the EWS, in which some national parliaments see the choice of a regulation over a directive as a subsidiarity violation.

The Amsterdam Protocol also provided guidelines on the subsidiarity principle, repeating almost exactly those enshrined in the ‘Overall Approach’:

- The issue under consideration has trans-national aspects which cannot be satisfactorily regulated by action by Member States
- Actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States’ interests
- Action at the Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States<sup>124</sup>

Yet, the Amsterdam Protocol did not indicate if the conditions for Community action had to be fulfilled cumulatively or if fulfilment of one of them, eg, the transnational character of

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<sup>120</sup> Michaela Heilbronner, ‘Die Justiziabilität des Subsidiaritätsprinzips im Lichte der Subsidiaritätsprotokolle’ in Ingolf Pernice (ed), *Der Vertrag von Lissabon: Reform der EU ohne Verfassung?; Kolloquium zum 10 Geburtstag des WHI* (Nomos 2008) 138.

<sup>121</sup> Paras 3 and 4 of Protocol on the application of the principles of subsidiarity and proportionality (Amsterdam Protocol).

<sup>122</sup> Conclusions of the Presidency, p. 20-21.

<sup>123</sup> de Búrca, ‘Re-appraising subsidiarity’s significance after Amsterdam’ (n 1) 32.

<sup>124</sup> Para 5 of Amsterdam Protocol.

the action, suffices for the Community to act.<sup>125</sup> In contrast, the ‘General Approach’ used an ‘and/or’ connector between the guidelines, implying that fulfilment of one of the guidelines allows the Community to go forward with its proposal. The Amsterdam Protocol is therefore often seen as a mere extract of the central principles established in the Edinburgh ‘Overall Approach’;<sup>126</sup> the guidelines ‘largely restate the broad political questions in open-ended terms, and do not provide strong legal criteria to answer them’.<sup>127</sup> However, no new criteria were established in the following years, either by the protocols to the Lisbon Treaty or in the Interinstitutional Agreement on Better Law-Making (2016).<sup>128</sup> It is the Amsterdam criteria to which the Commission<sup>129</sup> and national parliaments still refer.<sup>130</sup>

#### **D. Procedural Subsidiarity**

Article 296(2) TFEU prescribes that EU legal acts have to state the reasons on which they are founded and refer to respective proposals, initiatives, recommendations, requests, or opinions as demanded by the Treaties. In this respect, the CJEU’s case law maintains that the statement of reasons for an EU measure must show ‘clearly and unequivocally the reasoning of the author of the measure in question’ allowing concerned persons to learn the reasons for the measure and to enable the Court to review the measure, but it is not required for that statement to go into every relevant point of fact and law.<sup>131</sup> Whether the obligation to provide a statement of reasons has been satisfied, this ‘must be assessed with reference not only to the wording of the measure but also to its context and the whole body of legal rules governing the matter in question’.<sup>132</sup> Where a legislative act is reviewed for its compliance with the subsidiarity principle, the statement of reasons must make clear that the questions relevant to this principle were sufficiently considered.<sup>133</sup> The purpose of the procedural subsidiarity is thus to ensure

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<sup>125</sup> See Estella De Noriega (n 99) 107-114.

<sup>126</sup> Calliess (n 79) 66.

<sup>127</sup> de Búrca, ‘Re-appraising subsidiarity’s significance after Amsterdam’ (n 1) 26.

<sup>128</sup> Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ L 123, 12.5.2016, (Interinstitutional Agreement of 2016), 1–14.

<sup>129</sup> Report from the Commission on Subsidiarity and Proportionality, 18<sup>th</sup> Report on Better Lawmaking covering the year 2010, COM(2011) 344, 2.

<sup>130</sup> See eg House of Commons, Reasoned opinion on the Draft Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, COM(2012) 614.

<sup>131</sup> Case C-62/14, *Gauweiler and Others*, EU:C:2015:400, para 70 and the case law cited there.

<sup>132</sup> *Ibid.*

<sup>133</sup> Opinion of Advocate General Kokott of 23.12.2015 in Case C-358/14, *Poland v Parliament and Council*, EU:C:2015:848, para 174.

that EU institutions undertake a ‘process’ to make sure that the material subsidiarity is implemented.<sup>134</sup>

The Edinburgh ‘Overall Approach’ indicated that the compliance of a Community action with the subsidiarity principle had to be substantiated by ‘qualitative or, wherever possible quantitative indicators’.<sup>135</sup> The Commission proposed that it will consult at the pre-legislative stage on whether the proposal is compatible with the subsidiarity principle.<sup>136</sup> A recital of the proposal’s preamble would refer to the compatibility with the principle of subsidiarity, and the explanatory memorandum will provide more detail in this respect, when necessary.<sup>137</sup> The Commission should also prepare an annual report on the observance of Article 3b EC in its activities to be debated in the EP. Indeed, the Commission drafted its first report on the subsidiarity principle in 1994, later replaced by broader reports on ‘Better Lawmaking’.<sup>138</sup>

The Inter-institutional Agreement among the EP, the Council, and the Commission obliged the Commission to show in the proposal’s explanatory memorandum that the principle of subsidiarity was complied with, and the EP and the Council should complement the amendments of Commission proposals by a justification if such proposals contain a ‘more extensive or intensive’ Community action.<sup>139</sup> The institutions obliged themselves, following their internal procedures, to check proposals continuously for subsidiarity violations. The agreement also provided that the EP will hold a public debate on the Commission’s annual subsidiarity report in the presence of the Commission and the Council.

Despite the attempt to bring more clarity to the application of the subsidiarity principle, the Edinburgh Guidelines and the Inter-Institutional Agreement were perceived as ‘vague and only indicative’.<sup>140</sup> Nonetheless, they represented an effort to make subsidiarity ‘operational’.<sup>141</sup>

The Amsterdam Protocol maintained all the obligations for the Commission when proposing legislation: wide consultations before proposing legislation; inclusion of subsidiarity justification in its proposals, where necessary in an explanatory memorandum; and

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<sup>134</sup> Estella (n 99) 105.

<sup>135</sup> Overall Approach 19.

<sup>136</sup> Ibid 22.

<sup>137</sup> Ibid 22.

<sup>138</sup> de Búrca, ‘Re-appraising subsidiarity’s significance after Amsterdam’ (n 1) 33.

<sup>139</sup> Interinstitutional declaration on democracy, transparency and subsidiarity, Bull. EC 10-1993, 119.

<sup>140</sup> Ingolf Pernice, ‘Framework Revisited: Constitutional, Federal and Subsidiarity Issues’ (1995) 2 *Columbia Journal of European Law* 403, 408.

<sup>141</sup> Christian Timmermans, ‘Subsidiarity and transparency’ (1999) 22 *Fordham international law journal* 106, 108.

minimisation of financial or administrative burden for the Community and Member State authorities on different levels and making it proportional to the objective to be achieved.<sup>142</sup> The Commission should also submit its annual report on Article 3b EC.<sup>143</sup>

Article 5(3) TEU directs that EU institutions ‘apply the principle of subsidiarity’ as foreseen in Protocol No. 2 that establishes the conditions for the application of the subsidiarity principle. Protocol No. 2 merely repeats the obligations for draft legislative acts set already in the Amsterdam Protocol, namely, that before proposing legislation the Commission should conduct wide consultations.<sup>144</sup> The legislative proposals require a justification on the subsidiarity compliance, including a statement on its financial impact and, in cases of directives, implications for national (and regional) rules.<sup>145</sup> Moreover, legislative proposals should demonstrate with ‘qualitative and, wherever possible, quantitative indicators’ that the proposal’s objective can be better achieved at the EU level.<sup>146</sup> Finally, legislative drafts should consider the need to minimise financial or administrative burden for the EU, national entities, and citizens. It should be commensurate with the sought objective.

Over the years, a number of ways to justify the compatibility of Commission proposals with the principle of subsidiarity have been established: in the roadmaps or inception impact assessments prepared for major initiatives, in the impact assessments, in explanatory memoranda, and in recitals of the proposal’s preamble.<sup>147</sup> The roadmaps and inception impact assessments (roadmaps for initiatives subject to an impact assessment) that describe the problem and the objectives of the EU action contain an initial justification with regard to the subsidiarity principle.<sup>148</sup>

The explanatory memorandum accompanying a Commission proposal aims to explain it to other institutions and the public and is required for all legislative and non-legislative proposals for adoption by the Council or by the EP and the Council.<sup>149</sup> Protocol No. 2 does not

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<sup>142</sup> Para 9 of Amsterdam Protocol.

<sup>143</sup> Ibid.

<sup>144</sup> Art 2 of Protocol No. 2.

<sup>145</sup> Art 5 of Protocol No.2.

<sup>146</sup> Art 5 of Protocol No.2. The Edinburgh Declaration (at 19) obliged to provide indicators for both the national insufficiency test as well as the comparative efficiency test. Protocol No. 2 followed however Para 4 of the Amsterdam Protocol which demands such indicators only with regard to the latter test.

<sup>147</sup> See Report from the Commission on Subsidiarity and Proportionality, COM(2012) 373, 3 and Report from the Commission on Subsidiarity and Proportionality, COM(2016) 469, 2.

<sup>148</sup> Commission Staff Working Document, Better Regulation Guidelines accompanying the document Communication from the Commission to the European Parliament, the Council, the European economic and social Committee and the Committee of the Regions, SWD(2015) 111, (Better Regulation Guidelines), 7.

<sup>149</sup> Ibid 37.

refer to, as did the Amsterdam Protocol, justification of compliance of a proposal with the subsidiarity principle in explanatory memoranda ‘whenever necessary’.<sup>150</sup> However, the Interinstitutional Agreement on Better Law-Making requires a subsidiarity justification for each Commission legislative proposal.<sup>151</sup>

The subsidiarity justification in explanatory memoranda was often seen as superficial, simply reiterating that the proposal complies with the subsidiarity principle.<sup>152</sup> In 2015, under the ‘Better Regulation’ agenda, the Commission obliged itself to improve explanatory memoranda accompanying each of its proposals.<sup>153</sup> With regard to the subsidiarity principle, an explanatory memorandum should ‘explain the Union dimension of the problem’ and conduct both a ‘necessity test’ and ‘effectiveness test’.<sup>154</sup>

Impact assessments, introduced in 2003, have been seen as a tool to assess compliance of EU legislation with the subsidiarity principle.<sup>155</sup> The Commission is obliged to provide impact assessments for its legislative and non-legislative proposals, delegated acts, and implemented measures that are likely to have significant economic, environmental, or social effects.<sup>156</sup> Impact assessments deal with ‘the existence, scale and consequences of a problem and the question whether or not Union action is needed’.<sup>157</sup> They discuss, using qualitative and quantitative indicators, broader issues such as short-term and long-term costs of EU action and its economic, environmental, and social impact.<sup>158</sup> Impact assessments should also include when possible an assessment of lack of EU action (‘cost of non-Europe’) and the effect on competitiveness and the administrative burdens in such cases.<sup>159</sup>

The Commission’s ‘Better Regulation’ guidelines provide that an impact assessment should verify whether EU action at stake is compatible with subsidiarity by studying whether the issue has transnational aspects that Member States cannot adequately address and whether,

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<sup>150</sup> Para 9 of Amsterdam Protocol.

<sup>151</sup> Art 25 of Interinstitutional Agreement of 2016.

<sup>152</sup> Derrick Wyatt, ‘Is the European Union an Organisation of Limited Powers?’ in Anthony Arnall and others (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart 2011) 18.

<sup>153</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Better regulation for better results - An EU agenda, COM(2015) 215, 5.

<sup>154</sup> Better Regulation Guidelines, 38.

<sup>155</sup> Communication from the Commission on Impact Assessment, COM(2002) 276, 14. Note that Art 12 of Interinstitutional Agreement of 2016 does not explicitly demand such a section but uses a more convoluted statement when discussing impact assessments: ‘The principles of subsidiarity and proportionality should be fully respected, as should fundamental rights.’

<sup>156</sup> Art 13 of Interinstitutional Agreement of 2016.

<sup>157</sup> Art 12 of Interinstitutional Agreement of 2016.

<sup>158</sup> Ibid.

<sup>159</sup> Ibid.

comparatively, EU-level action would generate greater benefits because of its scale or effectiveness.<sup>160</sup> The guidelines indicate that subsidiarity evaluation will likely take place a number of times and that the rationale of the impact assessment process is to check whether proceeding with EU action ‘would make sense’.<sup>161</sup> The subsidiarity assessment should provide ‘concrete arguments, specific to the issues being analysed and substantiated with qualitative, and where possible, quantitative evidence’.<sup>162</sup> Impact assessments are drafted in English, with an executive summary prepared in all official EU languages.<sup>163</sup> The EP insists, however, that the principle of multilingualism should apply to impact assessments relating to vital aspects of public and political opinion.<sup>164</sup>

The Commission also prepared a ‘toolbox’ compiling information and guidance for EU policymakers on various stages of policy initiatives, including carrying out an impact assessment.<sup>165</sup> Specifically, when assessing subsidiarity, policymakers should perform a ‘necessity/relevance test’ and an ‘EU added value test’.<sup>166</sup> The former should show the ‘Union relevance’ of the initiative at stake by taking into consideration the geographical scope, number of business or actors involved in the Member States, and the ‘level of economic damage’ and establish whether a significant cross-border problem is at stake. The latter test considers advantages and disadvantages from EU action in comparison to those resulting from regional or national action by public or private entities.<sup>167</sup>

Finally, the Regulatory Scrutiny Board, an independent group of Commission officials and outside experts, checks the quality of all impact assessments. The board issues recommendations relating to subsidiarity and added value justification of proposals among a number of aspects of draft impact assessments.<sup>168</sup>

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<sup>160</sup> Better Regulation Guidelines, 21.

<sup>161</sup> Ibid.

<sup>162</sup> Ibid.

<sup>163</sup> Ibid, 16.

<sup>164</sup> European Parliament resolution of 4 February 2014 on EU Regulatory Fitness and Subsidiarity and Proportionality – 19th report on Better Lawmaking covering the year 2011, P7\_TA(2014)0061, point 42-50.

<sup>165</sup> European Commission, Better Regulation ‘Toolbox’, <[https://ec.europa.eu/info/better-regulation-toolbox\\_en](https://ec.europa.eu/info/better-regulation-toolbox_en)> (accessed 5 October 2017).

<sup>166</sup> Ibid 23.

<sup>167</sup> Ibid 23. Better Regulation Guidelines give more detail on ‘EU added value’ test. The examples of added value include coordination gains, improved legal certainty, greater effectiveness or complementarity. Yet, as those are hard to prove in quantitative terms, an added value test is frequently limited to qualitative indicators and ultimately a political judgment. See Better Regulation Guidelines, 60.

<sup>168</sup> See European Commission, Regulatory Scrutiny Board, Annual Report 2016, 15.



Impact assessments have contributed to ‘taking subsidiarity seriously’ by the Commission.<sup>169</sup> The increased use of the impact assessments in the pre-legislative phase has been seen as a ‘move towards proceduralization’ in the subsidiarity monitoring.<sup>170</sup>

### **E. The Relationship Between the Principles of Article 5 TEU**

Beyond subsidiarity, Article 5 TEU encompasses the principles of conferral and proportionality. Broadly speaking, the principle of conferral governs the limits of Union competences, while subsidiarity and proportionality govern the use of those competences.<sup>171</sup> Specifically, the principle of conferral allows the EU to act only within the limits of competences conferred upon it by the Member States in the treaties to achieve their objectives.<sup>172</sup> The principle of proportionality demands that EU action does not exceed what is necessary to achieve the treaties’ objectives and should be applied in line with Protocol No. 2.<sup>173</sup> The EU legal scholarship dealt especially with the understanding of the relationship with other principles of Article 5 TEU, a situation which has an impact on the issues that should be tested under Protocol No. 2.<sup>174</sup>

The principle of conferral can be seen as a ‘pre-question’ demanded by a systematic interpretation of Article 5 TEU, a reason why competence and subsidiarity cannot be separated.<sup>175</sup> The question of whether the EU has a nonexclusive competence to regulate a matter is seen by some as a ‘responsibility criterion’, the first step in the application of the subsidiarity principle.<sup>176</sup> A contrary view posits that the Amsterdam Protocol provided for ‘tangible contours’ to the concept of subsidiarity, allowing for its legal application as ‘a benchmark for the exercise of nonexclusive Community competences in specific cases’, in

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<sup>169</sup> Craig (n 85) 77.

<sup>170</sup> Xavier Groussot and Sanja Bogojević, ‘Subsidiarity as a Procedural Safeguard of Federalism’ in Loïc Azoulay (ed), *The question of competence in the European Union* (Oxford University Press 2014) 235. While Groussot and Bogojević acknowledge that a number of reasoned opinions criticised insufficient justification of Commission proposals (at 240), they separate the EWS from impact assessments as two different ‘competence-based tools.’ However, in fact the reasoned opinions often refer to the insufficient explanatory memoranda which may make the differentiation between the two tests not that clear cut. Moreover, the significance of impact assessments for Groussot and Bogojević seems to lie more in the judicial review of EU measures (at 243).

<sup>171</sup> Art 5(1) TEU.

<sup>172</sup> Art 5(2) TEU.

<sup>173</sup> Art 5(4) TEU.

<sup>174</sup> See Philipp Kiiver, *The early warning system for the principle of subsidiarity: Constitutional theory and empirical reality* (Routledge 2012) 98-100; Christoph Ritzer, Marc Ruttloff and Karin Linhart, ‘How to Sharpen a Dull Sword-The Principle of Subsidiarity and its Control’ (2006) 7 German Law Journal 733, 737.

<sup>175</sup> Calliess (n 79) 64

<sup>176</sup> Adam Cygan, *Accountability, parliamentarism and transparency in the EU* (Edward Elgar Publishing 2013) 133. Cygan puts forward a three-step test of the subsidiarity principle: ‘responsibility criterion’, ‘necessity requirement’, and ‘efficiency criterion.’

addition to the Lisbon Treaty's 'emphasis on the task of separation of competences'.<sup>177</sup> In this context, subsidiarity cannot settle the question of competence, even though the question might be related to the more general idea of subsidiarity.<sup>178</sup>

Similarly, there are a number of views regarding the relationship between subsidiarity and proportionality. According to the one viewpoint, there is a clear difference between the questions asked by subsidiarity and proportionality. The latter asks whether the action at stake is necessary to achieve the objective and whether it goes further than what is necessary to achieve that objective, while the former question concerns the issue of which level should take a given action.<sup>179</sup> Moreover, proportionality does not manifest subsidiarity because the Court applies proportionality throughout the treaty provisions, while subsidiarity concerns only those areas that do not fall into EU-exclusive competence.<sup>180</sup> An opposite view talks about a 'close relationship'<sup>181</sup> or even 'cannibalization' of subsidiarity by the proportionality principle by tying the 'who' and 'how' questions together.<sup>182</sup> Arguably the subsidiarity principle expressed in Article 5(3) TEU contains elements of the proportionality principle such as adequacy, necessity, and proportionality *sensu stricto*.<sup>183</sup> Adequacy is expressed by the phrase 'by reason of the scale or effects of the proposed action, be better achieved at Union level', whereas the 'if' and 'in so far as' in the subsidiarity formula enshrined necessity and proportionality *sensu stricto*, respectively.<sup>184</sup> A similar view maintains that subsidiarity takes into consideration elements of proportionality—the necessity of action at the EU level—'without exhausting the content of the proportionality principle'.<sup>185</sup>

A more complex understanding of the middle position is provided by Lenaerts, who maintains that subsidiarity can be understood both in *sensu stricto* (the 'if' question) and *lato sensu* (the 'in so far as' question) terms.<sup>186</sup> Subsidiarity *lato sensu* does involve a

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<sup>177</sup> Thomas von Danwitz, 'Subsidiaritätskontrolle in der Europäischen Union' in K. Hansmann K.-P. Dolde, S. Paetow, E. Schmidt-Assmann (ed), *Verfassung-Umwelt-Wirtschaft Festschrift für Dieter Sellner zum 75 Geburtstag* (Beck 2010) 40.

<sup>178</sup> Ibid 41.

<sup>179</sup> Edward (n 109) 100.

<sup>180</sup> Toth, 'The principle of subsidiarity in the Maastricht Treaty' (n 2) 1083.

<sup>181</sup> Thomas Blanke, 'The Principle of Subsidiarity in the Lisbon Treaty' in Niklas Bruun, Klaus Lörcher and Isabelle Schömann (eds), *The Lisbon Treaty and Social Europe* (Hart 2012) 253.

<sup>182</sup> Groussot and Bogojević (n 170) 237.

<sup>183</sup> Jacques Ziller, 'Le principe de subsidiarité' in Jean-Bernard Auby and Jacqueline Dutheil de la Rochère (eds), *Traité de droit administratif européen* (Bruylant 2014) 529.

<sup>184</sup> Ibid.

<sup>185</sup> Jean-Victor Louis, 'Quelques remarques sur l'avenir du contrôle du principe de subsidiarité' in Aline De Walsche and Laure Levi (eds), *Mélanges en hommage à Georges Vandersanden: promenades au sein du droit européen* (Bruylant 2008) 291 (own translation).

<sup>186</sup> Lenaerts, 'The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism' (n 3) 875.

proportionality assessment, which, according to Lenaerts, implies that two expressions of the proportionality principle are at stake in Article 3b EC, current Article 5(3) TEU.<sup>187</sup> The use of ‘and in so far as’ with regard to EU action, both in the first version of the subsidiarity formula of the Maastricht Treaty and in its current Lisbon version, ‘indicates the permissible *extent* of such action’ and ‘makes it difficult to distinguish sharply between subsidiarity and proportionality’.<sup>188</sup> Yet, while the proportionality test involved in subsidiarity questions concerns only shared competences, the proportionality principle in general refers to all types of competence. In addition, the proportionality aspect involved in subsidiarity protects specifically the sovereignty of Member States, whereas the general proportionality principle applies to values protected under EU law.<sup>189</sup>

Against the overview of possible stances on the mutual relationship between principles expressed by the legal scholarship, Schütze’s understanding of Article 5 TEU presents a systematised approach to all three principles. In his approach, the conferral question is a ‘general “whether” of Union action’ that is answered by the policy area as a whole.<sup>190</sup> In other words, the competence question asks whether the EU can generally act in any given area. In contrast, the focus of subsidiarity is on a specific act at stake. Furthermore, Schütze ties together subsidiarity’s ‘whether’ question and proportionality’s ‘how’ question, arguing that together they imply that subsidiarity has to be understood as ‘*federal* proportionality’.<sup>191</sup> Similar to Lenaerts, cited above, Schütze maintains that the distinction between these principles lies in the issues that they protect: the private rights of an individual in cases of proportionality and the ‘collective autonomy’ of a group under subsidiarity.<sup>192</sup> Proportionality should then be restricted to safeguarding private rights against excessive public interference.<sup>193</sup> Hence, the relevant content of Article 5 TEU can be summarised as follows: ‘the enumeration principle will tell us whether the Community *can* act within a policy field. The subsidiarity principle would examine whether a European law *disproportionately restricts national autonomy*; and

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<sup>187</sup> Ibid (n 3) 883.

<sup>188</sup> Lenaerts, ‘Subsidiarity and Community competence in the field of education’ *ibid* n(102) 3, 25. Lenaerts argues that Art 3b contains in fact two expressions of the proportionality principle.

<sup>189</sup> Lenaerts, ‘The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism’ (n 3) 884.

<sup>190</sup> Schütze (n 4) 263.

<sup>191</sup> Ibid.

<sup>192</sup> Ibid.

<sup>193</sup> Ibid 264.

the principle of proportionality would, finally, tell us whether a European law *unnecessarily interfered with liberal values*'.<sup>194</sup>

## V. Subsidiarity in the Court of Justice

### A. The Limits of CJEU Jurisprudence on the Subsidiarity Principle

Subsidiarity is clearly legally binding, and it remains under the judicial control of the CJEU.<sup>195</sup> After the introduction of subsidiarity into the Maastricht Treaty, scholars expected an overflow of litigation on the new principle.<sup>196</sup> But already it was expected that the Court would not conduct a subsidiarity check 'any further than is absolutely necessary for ensuring and respecting the Rule of Law'.<sup>197</sup> After Maastricht, only a handful of subsidiarity challenges were brought before the Court, and this trend has continued under the expanded subsidiarity regime following the Lisbon Treaty.<sup>198</sup> Overall, in its jurisprudence the Court has limited its scrutiny of the reasoning of the Commission on subsidiarity matters and indeed in no case to date has the Court found a violation of subsidiarity.

The first reason for the Court's restraint lies in subsidiarity's being 'political in nature'.<sup>199</sup> As a result, its enforcement must arguably remain within the purview of political institutions, and this limits the ability of the Court to apply a high level of legal scrutiny.<sup>200</sup> Others have argued that subsidiarity is both a legal and a political principle.<sup>201</sup> For example, Schütze talks about the political and the judicial nature of subsidiarity, with only the latter concerning its 'substantiation' before the Court.<sup>202</sup> The Court itself in Tobacco Products Directive litigation clearly distinguished that the initial, political review of subsidiarity is in the hands of national

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<sup>194</sup> Ibid.

<sup>195</sup> Theodor Schilling, 'A New Dimension of Subsidiarity: Subsidiarity as a Rule and a Principle' (1995) 14 Yearbook of European Law 203, 212.

<sup>196</sup> Toth, 'The principle of subsidiarity in the Maastricht Treaty' (n 5) 1101.

<sup>197</sup> Nicholas Emiliou, 'Subsidiarity: An Effective Barrier Against "the Enterprises of Ambition"?' (1992) 17 European law review 383, 405.

<sup>198</sup> Craig (n 85) 80. The most significant cases include Case C-84/94 *United Kingdom v. Council* [1996] ECLI:EU:C:1996:431 (Working Time Directive) and Case C-233/94 *Germany v. Parliament and Council* [1997] ECLI:EU:C:1997:231 (Deposit-Guarantee Schemes). See Estella De Noriega (n 99) 137-176. The cases that concern subsidiarity principle brought before the entry into force of the Lisbon Treaty but decided its entry into force Treaty include: Case C-176/09 *Luxembourg v Parliament and Council* [2011] ECLI:EU:C:2011:290; Case C-539/09 *Commission v Germany* [2011] ECLI:EU:C:2011:733, para 85 and the *Opinion of Advocate General Trstenjak in Commission v Germany* [2011] ECLI:EU:C:2011:345, paras 81-85.

<sup>199</sup> Takis Tridimas, 'The Rule of Reason and its Relation to Proportionality and Subsidiarity' in Antoinette Schrauwen (ed), *Rule of Reason Rethinking another Classic of European Legal Doctrine* (2005) 120.

<sup>200</sup> Jit Peters, 'National Parliaments and Subsidiarity: Think Twice' (2005) 1 European Constitutional Law Review 68, 70.

<sup>201</sup> de Búrca, 'Re-appraising subsidiarity's significance after Amsterdam' (n 1) 3.

<sup>202</sup> Schütze (n 4) 257.

parliaments, while the Court has to decide whether the EU legislature ‘was entitled to consider, on the basis of a detailed statement, that the objective of the proposed action cannot be better achieved at EU level’.<sup>203</sup>

A second, related reason for the limited judicial scrutiny lies in the character of the subsidiarity principle as a ‘catch-all formula of good government and common sense, rather than a well-defined political or philosophical principle’, and without ‘clear legal content’.<sup>204</sup> The ‘bipolar ethos’ inherent in the subsidiarity principle, specifically the preservation of national autonomy and comparative efficiency of centralisation, explains the adherence of the Court to the separation of powers: the Court has tried to avoid ‘substituting its own judgment for that of the institutions, in assessing a choice which was ultimately perceived as political’.<sup>205</sup>

A third possible explanation is the political agenda of the Court guided by the ‘idea of integration’, which may be endangered by the ‘anti-integration’ character of the subsidiarity principle, directed specifically against the growth of EU competences.<sup>206</sup> Finally, if Member States adopted a legislative act via qualitative majority voting, the adoption decision implied that there were enough Member States that thought a given EU action fulfilled the subsidiarity test, rendering judicial review superfluous.<sup>207</sup> Some commentators now urge the Court to insist ‘more sternly on transparency and reason-giving in support of legislative choices made’<sup>208</sup> and to give up on the manifest-error doctrine by adopting a ‘doctrinal framework’ for subsidiarity and proportionality.<sup>209</sup>

Overall, the common view is that the CJEU did not become an effective guardian of subsidiarity.<sup>210</sup> Its vague pronouncements of subsidiarity compliance provided drafting

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<sup>203</sup> Case C-358/14, para 112 and 114.

<sup>204</sup> Estella De Noriega (n 99) 96, 139.

<sup>205</sup> Andrea Biondi, ‘Subsidiarity in the Courtroom’ in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU law after Lisbon* (Oxford University Press 2012) 213, 220.

<sup>206</sup> Estella De Noriega (n 99) 7.

<sup>207</sup> Craig (n 85) 81.

<sup>208</sup> Stephen Weatherill, ‘The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court’s Case Law has Become a Drafting Guide’ (2011) 12 *German Law Journal* 827, 859.

<sup>209</sup> Mattias Kumm, ‘Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union’ (2006) 12 *European Law Journal* 503. Such a ‘S&P Framework’ consists of the following three prongs: ‘federal intervention has to further legitimate purposes, has to be necessary in the sense of being narrowly tailored to achieve that purpose, and has to be proportionate with regard to costs or disadvantages relating to the loss of Member States’ regulatory autonomy.’

<sup>210</sup> Giuseppe Martinico, ‘Dating Cinderella: On subsidiarity as a political safeguard of federalism in the European Union’ (2011) 17 *European Public Law* 649, 655. For a view that the CJEU applied subsidiarity, but under a different heading of review see Thomas Horsley, ‘Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?’ (2012) 50 *Journal of Common Market Studies* 267, 270.

instructions for EU institutions, and in consequence made it harder for the Court to annul such a legislative act over subsidiarity issues in the future.<sup>211</sup>

The broadening of EU competences and the extension of majoritarian decision-making in the Lisbon Treaty arguably put the Court under much stricter public scrutiny.<sup>212</sup> In consequence, the Court is expected to increase its control over the exercise of competences by the EU and advance a counter-majoritarian approach when reviewing EU legislation.<sup>213</sup> The fact that the CJEU has never declared an EU act as violating subsidiarity should not have a deterrent effect on bringing cases before the Court.<sup>214</sup>

## **B. Post-Lisbon Subsidiarity Case Law**

Since the entry into force of the Lisbon Treaty, the Court has considered subsidiarity only in a small number of CJEU cases.<sup>215</sup> The few available judgments point to two trends in the Court's analysis of subsidiarity: (i) the significance of the cross-border nature of a proposal in justifying EU action, and (ii) the need to substantiate compliance with the subsidiarity principle through evidence and, in particular, the use of impact assessments for the analysis of the subsidiarity question. These trends emphasise two aspects of subsidiarity in the Treaties, as discussed previously.

The first aspect in the subsidiarity case law is the cross-border test in instances concerning the internal market, for which an almost automatic prejudice for EU action appears to apply. The Amsterdam Protocol indicated this test as a guideline to justify action at the EU level: the issue at stake has transnational aspects that cannot be regulated satisfactorily at the national level.<sup>216</sup> According to Advocate General (AG) Maduro in the Vodafone case, action should be taken at the EU level whenever the EU has 'a special interest in protecting and promoting economic activities of a cross-border character' and 'the national democratic process is likely

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<sup>211</sup> Weatherill (n 208).

<sup>212</sup> Miguel Poiares Maduro and Loïc Azoulay, 'Introduction' in M Poiares Maduro and Loïc Azoulay (eds), *The Past and The Future of EU Law The Classics of EU Law Revisited on the 50th Anniversary of the Treaty of Rome* (Hart 2010) XIX.

<sup>213</sup> Ibid.

<sup>214</sup> Ziller (n 183) 533.

<sup>215</sup> According to a search on curia.europa.eu, when inserting 'Art 5(3) TEU' in the field 'references to case law and legislation' six cases were brought before the Court after the entry into force of the Lisbon Treaty: C-547/14 *Philipp Morris Brands and Others* ECLI:EU:C:2016:325; C-477/14 *Pillbox 38* ECLI:EU:C:2016:324; C-358/14 *Poland v Parliament and Council* ECLI:EU:C:2016:323; C-276/14 *Gmina Wrocław* ECLI:EU:C:2015:635; C-508/13 *Estonia v Parliament and Council* ECLI:EU:C:2015:403; C-507/13 *United Kingdom v Parliament and Council*, ECLI:EU:C:2014:2481 (action of annulment withdrawn by the UK).

<sup>216</sup> Art 5 Amsterdam Protocol.

to fail to protect cross-border activities'.<sup>217</sup> That was the case with the roaming retail prices in the Vodafone litigation. Generally speaking, the EU should take action in cases in which there is a transnational dimension of an issue that national process may fail to regulate and that will, in turn, increase the added value of EU legislative intervention.<sup>218</sup> In its decision, the Court did not repeat this argument, but simply referred to the regulation's objective 'to contribute to the smooth functioning of the internal market'.<sup>219</sup>

The case law concerning the Tobacco Products Directive highlights issues arising with subsidiarity scrutiny when the objective of an EU act concerns the functioning of the internal market based on Article 114 TFEU.<sup>220</sup> The new directive was challenged in the CJEU in three different proceedings on a number of grounds including the compliance with the subsidiarity principle of various aspects of the directive. Specifically, it was contested whether the prohibition of menthol cigarettes<sup>221</sup> and the new rules on e-cigarettes were compatible with the subsidiarity principle.<sup>222</sup> AG Kokott,<sup>223</sup> conducting the subsidiarity review of the directive, analysed both the substance of the EU measure and the statement of reasons.<sup>224</sup> With regard to the substance of the directive, the AG focused mainly on the cross-border dimension of the problem arguing that it is impossible to address at national level.<sup>225</sup> The AG's opinion specified that since the aim of Article 114 TFEU is to eliminate obstacles to cross-border trade, 'as a rule' Member States cannot sufficiently achieve this objective.<sup>226</sup> Poland tried to counter this

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<sup>217</sup> Case C-58/08 *Opinion of Advocate General Poiares Maduro in Vodafone and others* [2009] ECLI:EU:C:2009:596 para 34.

<sup>218</sup> The cross-border character of an activity implying a need for an EU-level regulation is not always obvious. For example, AG Maduro in the Vodafone case differentiates between the justification for the harmonisation of the wholesale and retail roaming prices. Whereas few could dispute that the wholesale roaming price had a cross-border character, it was argued by some that the retail prices could have been regulated at the national level once the wholesale prices were harmonised. However, as AG Maduro explained, EU-level regulation of the retail prices was needed, as the retail roaming prices were just a small part of domestic communications, and the national regulators might have failed to protect this cross-border activity.

<sup>219</sup> C-58/08, para 76.

<sup>220</sup> Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC, OJ L 127, 29.4.2014, 1–38.

<sup>221</sup> C-547/14, *Philip Morris Brands and Others* [2016] ECLI:EU:C:2016:325 and C-358/14 *Poland v. Parliament and Council* [2016] ECLI:EU:C:2016:323.

<sup>222</sup> C-477/14, *Pillbox 38* [2016] ECLI:EU:C:2016:324.

<sup>223</sup> The AG provided the most extensive opinion on subsidiarity in *Poland v. Parliament and Council* case, referring to that opinion in the other proceedings. Opinion of the AG Kokott delivered on 23 December 2015, C-358/14 *Poland v. Parliament and Council* [2015] ECLI:EU:C:2015:848. According to the AG, the *Philip Morris Brands and Others* and *Pillbox 38* cases concern subsidiarity 'only briefly' (see [2015] ECLI:EU:C:2015:853, para 273 and [2015] ECLI:EU:C:2015:854, para 159 respectively).

<sup>224</sup> Opinion of the AG Kokott, C-358/14, para 140.

<sup>225</sup> Ibid, paras 151-153.

<sup>226</sup> Ibid, para 154.

argument by arguing that the issue of menthol-flavoured tobacco does not have a cross-border dimension because of diverse consumption patterns and economic structures among the Member States and the fact that the biggest markets in this respect (Poland, Slovakia, and Finland) can provide for ‘health-related action’ at the national level.<sup>227</sup> The AG disagreed with this reasoning and pointed out that the objective of the directive is to remove obstacles for the trade of tobacco products and simultaneously ensuring a high level of health protection, and this can be done only when all characterizing flavours are prohibited.<sup>228</sup> Moreover, the AG argued that differences in consumption patterns across the Member States do not matter as such. The core of the problems are whether there is or will be cross-border trade in this area and whether the obstacles can be ‘efficiently’ removed by Member States on their own.<sup>229</sup> The AG concluded that there exists a ‘lively’ cross-border trade in the tobacco market, with differences between Member States on the rules of characterizing flavours, and therefore the EU did not commit a manifest error in the assessment of the facts in its appraisal of the question of subsidiarity.<sup>230</sup>

The Court did not follow in discussing the details of cross-border trade, but, instead, focused on the objectives of the directive. It assessed that even if one of the objectives of the directive, ensuring a high level of protection of human health, could be better achieved at the national level, the other objective, improvement of the functioning of the internal market for tobacco, would be shattered if tobacco with characterising flavour would be permitted in some Member States and forbidden in others.<sup>231</sup> The ‘interdependence’ of those objectives makes the EU level better placed to achieve them.<sup>232</sup> Moreover, in the view of the Court, the subsidiarity principle does not aim to set limits on EU action on the basis of the situation in a specific Member State assessed individually, but, instead, simply demands that the action can be better achieved at the EU level in view of the objectives of the Treaties.<sup>233</sup> The Court rejected Poland’s argument that since menthol cigarettes are consumed predominantly in only three Member States, the objective of protection of human health could be better achieved at the national level. That argument was rejected because, in fact, menthol cigarettes had a market share greater than the EU-wide market share in at least eight additional Member States.<sup>234</sup>

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<sup>227</sup> Ibid, para 155.

<sup>228</sup> Ibid, para 157.

<sup>229</sup> Ibid, para 158.

<sup>230</sup> Ibid, para 160.

<sup>231</sup> Ibid, para 117.

<sup>232</sup> Ibid, para 118.

<sup>233</sup> Ibid, para 119.

<sup>234</sup> Ibid, para 120.



The second aspect of the Court's subsidiarity case law is the relatively recent focus on the duty to justify EU action with specific evidence, in particular, the reference to impact assessments in that question. This is in contrast to earlier judgements, when the Court's review of the procedural aspects of subsidiarity often required not more than a mention of the reasons for the Community to act in the preamble of the proposal.<sup>235</sup> The Vodafone case concerning roaming charges is seen as the beginning of this trend<sup>236</sup> and is the first case in which the Court referred to the impact assessment to support the review of the proportionality principle,<sup>237</sup> following up on the similar application of that impact assessment by the AG Maduro.<sup>238</sup> The AG underlined that the intent of the EU legislator is not enough to show compliance of the act with the subsidiarity principle, but that it instead should be required to compare the benefits of EU action with the possible problems and the costs of national action.<sup>239</sup>

In the subsequent Luxembourg airports case, the Court again referred to the impact assessment showing that the Commission pondered a number of options with regard to the airport charges that were at stake.<sup>240</sup> Moreover, in both the Luxembourg airports and the Vodafone cases, the Court referred to the guidelines established by the Amsterdam Protocol when deciding on the compatibility of the regulation at stake with the subsidiarity principle.<sup>241</sup> However, it is notable that the Court did not demand that each of the provisions of the directive have a separate subsidiarity justification.<sup>242</sup>

Finally, before the Tobacco Products Directive case, there remained cases in which the Court appeared to be more lenient. For example, in the VAT case, the Court was once more satisfied with a mere recital in the preamble of the directive, stating that its objective of harmonisation of VAT systems of the Member States can be better achieved at the EU level.<sup>243</sup>

The Tobacco Products Directive litigation finally provided a more elaborate inquiry into procedural subsidiarity, again referencing the evidence in the impact assessment. The preamble of the directive in that case contained the classic subsidiarity justification,<sup>244</sup> but the impact

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<sup>235</sup> Estella (n 99) 157

<sup>236</sup> Groussot, Bogojevic (n 170) 246.

<sup>237</sup> C-58/08, Vodafone and Others, ECLI:EU:C:2010:32, para 55.

<sup>238</sup> Case C-58/08 Opinion of Advocate General Poiares Maduro in Vodafone and others [2009] ECLI:EU:C:2009:596 para 39.

<sup>239</sup> C-58/08 Opinion para 30.

<sup>240</sup> C-176/09 Luxembourg v Parliament and Council, para 65.

<sup>241</sup> C-58/08, Vodafone and Others, para 72; C-176/09 Luxembourg v Parliament and Council, ECLI:EU:C:2011:290, para 76.

<sup>242</sup> C-508/13 Estonia v Parliament and Council, ECLI:EU:C:2015:403, para 53.

<sup>243</sup> C-276/14, Gmina Wrocław, para 41.

<sup>244</sup> Recital 60 of the preamble of Directive 2014/40/EU.

assessment provided an explicit subsidiarity justification covering one page.<sup>245</sup> In it, the Commission points out how the different national approaches to tobacco limit the functioning of the internal market and argues that the directive would produce ‘clear benefits’. These drew on the more detailed analysis and comparison of the effects of doing nothing and pursuing different options.

AG Kokott assessed the procedural subsidiarity angle since Poland claimed that the Commission’s directive lacks sufficient subsidiarity justification, more specifically that only one recital of the directive’s preamble deals with subsidiarity.<sup>246</sup> The AG confirmed that the directive only reproduces the text of Article 5(3) TEU.<sup>247</sup> Despite this ‘empty formula’ used by the EU legislator, the AG found that other recitals in the preamble, even though they do not directly reference subsidiarity, but, rather, justify the use of Article 114 TFEU, are nonetheless relevant to the subsidiarity question because of the overlap in the reasoning applicable to internal market and subsidiarity provisions.<sup>248</sup> Moreover, the AG underlined that the explanatory memorandum in the Commission proposal and the impact assessment discussed the insufficiency of national rules and the added value of EU action and that both were available to EU institutions and national parliaments in the legislative procedure.<sup>249</sup> The AG advised the EU legislature to avoid ‘empty formulas’ and substantiate the preamble with regard to the subsidiarity principle in future legislative acts, but she did not find a violation of the procedural aspect of the subsidiarity principle.<sup>250</sup>

Moreover, when assessing the ‘added value’ of EU action,<sup>251</sup> the AG pointed out that although it might be an ‘automatic’ case with regard to Article 114 TFEU legislation, it still demanded a quantitative and qualitative test.<sup>252</sup> The AG established that the market at stake has a ‘substantial trade volume and affects the lives of millions of Union citizens every day’ (‘quantitative test’) and that the issue at stake is ‘beyond national boundaries’, confirming a common European interest (‘qualitative test’).<sup>253</sup> Again, the AG found no manifest error of

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<sup>245</sup> Commission Staff Working Document , Impact Assessment Impact accompanying the Proposal for a Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products, SWD(2012)452, Part 1, at 46. The subsidiarity justification in the explanatory memorandum was a shorter version of that justification in the impact assessment.

<sup>246</sup> Opinion of the AG Kokott, C-358/14, para 175.

<sup>247</sup> Ibid, para 177.

<sup>248</sup> Ibid, para 180.

<sup>249</sup> Ibid, paras 182-185.

<sup>250</sup> Ibid, para 188.

<sup>251</sup> Ibid, para 162.

<sup>252</sup> Ibid, paras 164-165.

<sup>253</sup> Ibid, para 167.

assessment in the Commission's reasoning and argued that the directive therefore also passed the positive aspect of the subsidiarity test.<sup>254</sup>

The Court decision focussed less on the details of the quantitative and qualitative test, but instead highlighted the availability of information in the Commission documents. It conducted its assessment 'not only by reference to the wording of the contested act, but also by reference to its context and the circumstances of the individual case': both the proposal and the impact assessment have provided 'sufficient information' pointing out 'clearly and unequivocally' the benefits of EU action.<sup>255</sup> Moreover, since Poland participated in the legislative procedure, it cannot raise an argument that it did not know the reasoning behind the measures intended by the EU legislature.<sup>256</sup> In addition, when assessing the proportionality of the prohibition of mentholated tobacco, the Court considered another aspect of Article 5 of Protocol No. 2 that sets the procedural requirements for EU acts, namely, the need to take into account that any burden upon the economic operators should be minimised and commensurate with the sought objective. The lost jobs and revenue due to the prohibition were mitigated, in the view of the Court, by giving the industry and consumers until 2020 to adapt and by showing in the impact assessment that the ban will decrease the number of smokers.<sup>257</sup>

In summary, the recent judgements of the CJEU indicate that compliance with the subsidiarity principle may derive almost automatically from the cross-border nature of a proposal at hand, for example, to achieve the objective of internal market integration. However, in making this case, as with other arguments, the Commission will likely be expected to go beyond the empty formulas found in recitals of previous legislation and provide specific evidence such as the cost-benefit analysis found in supporting impact assessments in order to satisfy the procedural requirements of the subsidiarity principle. As such, the subsidiarity jurisprudence of the Court did not change substantially since its early pronouncements on the issue. It remains to be seen whether the Court will sharpen its inquiry into the procedural aspect of subsidiarity.<sup>258</sup>

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<sup>254</sup> Ibid, para 168. At this point the AG referred to the preamble of the act.

<sup>255</sup> C-358/14, para 122-123.

<sup>256</sup> Ibid, para 125.

<sup>257</sup> Ibid, para 100-101.

<sup>258</sup> Jacob Öberg, 'Subsidiarity as a Limit to the Exercise of EU Competences' [2016] Yearbook of European Law 1.

### C. Subsidiarity Action

Finally, a new source of subsidiarity focus in the Court might be connected to the subsidiarity requests coming from national parliaments, according to Article 8 of Protocol No. 2.<sup>259</sup> The Court is competent ‘in actions on ground of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 263 [TFEU] by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof’. However, Article 8 of Protocol No. 2 did not grant national parliaments independent standing before the ECJ; as a category, national parliaments can be seen as ‘indirect semi-privileged applicants’.<sup>260</sup> Since the ex post subsidiarity review procedure has not yet been applied, it is difficult to predict whether and how it will be enforced. The question remains whether national parliaments should have gained an independent standing before the Court. In favour of giving national parliaments independent standing before the Court are ‘the periodic failings of national executives to reflect the concerns of national Parliaments in Council negotiations’.<sup>261</sup> In fact, an argument could be made that, already, the national design of the rules on subsidiarity action sometimes allows national parliaments a lot of independence in the subsidiarity action.<sup>262</sup> The involvement of national parliaments in the subsidiarity action may thus create a chance for some new subsidiarity case law.

## VI. Reasons for Introduction of the EWS

The EWS was seen as a way to satisfy both federal and democratic safeguards within the EU.<sup>263</sup> National parliaments could act as a safeguard on EU institutions in checking if such institutions comply with the subsidiarity principle, and at the same time they could provide democratic input.

### A. Competence Creep

The decision to grant national parliaments the power to control the subsidiarity principle was connected with the EU Member States’ dissatisfaction with the Court’s case law on subsidiarity

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<sup>259</sup> Biondi (n 205) 223.

<sup>260</sup> Katarzyna Granat, ‘Institutional design of the Member States for the ex post subsidiarity scrutiny’ in Marta Cartabia, Nicola Lupo and Andrea Simoncini (eds), *Democracy and subsidiarity in the EU National parliaments, regions and civil society in the decision-making process* (Il Mulino 2013) 432.

<sup>261</sup> Stephen Weatherill, ‘Better competence monitoring’ (2005) 30 *European Law Review* 23, 40. Because Weatherill’s point was raised at the time of the Constitutional Treaty, the action, in Weatherill’s view, was to cover matters already signaled in the ex ante reasoned opinion procedure.

<sup>262</sup> Granat, ‘Institutional design of the Member States for the ex post subsidiarity scrutiny’ (n 260) 446ff.

<sup>263</sup> Schütze (n 4) 258.

and seen as a palliative against ‘competence creep’.<sup>264</sup> The phenomenon of ‘competence creep’, the situation in which the scope of action taken by the EU has tended to ‘creep’ outwards beyond that foreseen by the Treaty was in particular connected to the broad framing of the current Articles 114 TFEU and 352 TFEU.<sup>265</sup> In consequence, a clearer delimitation of EU competence became part of the agenda after the Treaty of Nice.<sup>266</sup> The Laeken Declaration on the Future of the European Union urged a ‘better division and definition of competence in the European Union’.<sup>267</sup>

## **B. Democratic Deficit**

The other reason for involving national parliaments directly was the perception that ‘[d]emocracy was not part of the original DNA of European Integration’<sup>268</sup> and that the ‘democracy issue’ of the EU is that EU institutions suffer from a legitimacy crisis.<sup>269</sup> The EU’s democratic deficit is to be understood in the light of ‘input’ and ‘output’ legitimacy that are two ‘legitimizing beliefs’ for the exercise of governing authority.<sup>270</sup> Input-oriented legitimacy means that ‘political choices are legitimate if and because they reflect the “will of the people” – that is, if they can be derived from the authentic preferences of the members of a community’.<sup>271</sup> Under output-oriented legitimacy, ‘political choices are legitimate if and because they effectively promote the common welfare of the constituency in question’.<sup>272</sup> Viewed from this perspective, the transfer of competence from the national level to the EU level within the process of European integration raised the question of the legitimisation of EU authorities and laws and about the EU’s input and output legitimacy.

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<sup>264</sup> Stephen Weatherill, ‘Competence creep and competence control’ (2004) 23 Yearbook of European Law 1, 6.

<sup>265</sup> Stephen Weatherill, ‘Using national parliaments to improve scrutiny of the limits of EU action’ (2003) 28 European law review 909, 910.

<sup>266</sup> Paul Craig, *EU administrative law* (Oxford University Press 2012) 369.

<sup>267</sup> Laeken Declaration on the future of the European Union, Annex I to Presidency Conclusions, Laeken 14 and 15 December 2001, 21-22.

<sup>268</sup> Joseph H. H. Weiler, ‘In the face of crisis: Input legitimacy, output legitimacy and the political messianism of European integration’ (2012) 34 Journal of European integration 825, 837.

<sup>269</sup> Joseph H. H. Weiler, ‘The transformation of Europe’ (1991) 100 Yale Law Journal 2403, 2472.

<sup>270</sup> Fritz W Scharpf, *Governing in Europe: effective and democratic?* (Oxford University Press 1999) 6. Weiler adds a third pillar of democratic legitimacy, narrative (entity, myth, dream, political Messianism): in the EU the ‘justification for action and its mobilizing force derive not from process, as in classical democracy, or from result and success, but from the ideal pursued.’ See Weiler, ‘In the face of crisis: Input legitimacy, output legitimacy and the political messianism of European integration’ 832.

<sup>271</sup> Scharpf (n 270) 6.

<sup>272</sup> Ibid.

The transfer of power expresses the idea that competences that used to be exercised at the national level have ‘disappeared’.<sup>273</sup> While at the Member State level, the law is enacted by democratically elected parliaments, the European level is perceived by EU citizens as not having the same democratic legitimacy. With the transfer of power, however, the legislative process at the EU level has strengthened the position of governments ‘by making the statal executive branch the ultimate legislator in the Community’.<sup>274</sup> In addition, the scrutiny of governmental decisions at EU level remains a national process, one aimed at holding into account national actors.<sup>275</sup> This creates an input legitimacy deficit. A parallel transfer of democratic legitimacy has not accompanied the transfer of competences; the EU level has not received more legitimacy. National parliaments ‘appear[ed] as the net losers in the new institutional equilibrium resulting from EC membership’.<sup>276</sup> Two attempts have been made to solve the EU’s ‘democratic issue’; the first centred on the European Parliament (EP), the second on national parliaments.

The first of the attempts has been to increase the role of the directly elected EP in the legislative process. Indeed, the EP ‘emerged as a winner in the Lisbon Treaty’ as a result of the extension of the ordinary legislative procedure, whereby decisions are taken jointly by the EP and the Council, and the conferral of more control over the appointment of the President of the EU Commission.<sup>277</sup> Those claiming the second-order character of EP elections (a well-known claim of Reif and Schmitt is that EP elections have the character of a protest vote against governments in power and that the electoral turnout is lower each time) might also have softened their views after the 2014 EP elections.<sup>278</sup> The elections’ outcomes<sup>279</sup> show that ‘traditional left-right and pro-anti-European integration counterbalanced the traditional

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<sup>273</sup> Leonard FM Besselink, ‘National parliaments in the EU’s composite constitution: a plea for a shift in paradigm’ in P. Kiiver (ed), *National and Regional Parliaments in the European Constitutional Order* (Europa Law Publishing 2006) 119. Besselink points also to the use of ‘transfer’ instead of more neutral ‘attribution’ or ‘conferral’ of competence.

<sup>274</sup> Weiler, ‘The transformation of Europe’ (n 269) 2430.

<sup>275</sup> Besselink (n 273) 119.

<sup>276</sup> Bruno de Witte, ‘Community law and national constitutional values’ (1991) 18 *Legal Issues of Economic Integration* 1, 8.

<sup>277</sup> Paul Craig, *The Lisbon Treaty: law, politics, and treaty reform* (Oxford University Press 2010) 72.

<sup>278</sup> Karlheinz Reif and Hermann Schmitt, ‘Nine Second - order National Elections—a Conceptual Framework for the Analysis of European Election Results’ (1980) 8 *European journal of political research* 3. Cf. Andreas Follesdal and Simon Hix, ‘Why there is a democratic deficit in the EU: A response to Majone and Moravcsik’ (2006) 44 *Journal of Common Market Studies* 533, 536.

<sup>279</sup> The 2014 turnout was 43.09% in comparison to 43% in 2009, hence it did not improve, but also did not fall. See further: <<http://www.results-elections2014.eu/en/turnout.html>> (accessed 6 October 2017).

determination to punish national governments', proving some politicisation of these elections.<sup>280</sup>

The second attempt to strengthen the EU's democratic legitimacy was the reinforcement of the role of the national parliaments within the European legislative process. This approach was grounded in the diagnosis of a 'democratic disconnect' of the EU supranational institutions, limiting the EU's legitimacy. Contrary to the idea of the 'democratic deficit', which applies to the EU institutions per se, the 'disconnect' arises from the assertion that it is the national level that ultimately carries legitimacy for cultural and historical reasons, and without more involvement of national parliaments, the EU remains disconnected from this source of legitimacy.<sup>281</sup> As a consequence, democratization efforts should focus on the linkages between EU institutions' producing norms and the democratically legitimised national level that oversees and controls them, in contrast to a 'democratic deficit' perspective that concentrates solely on the democratization of EU institutions, independent from the national level.<sup>282</sup>

The core element in the process of reconnecting the EU with national parliaments was the EWS, and this avenue of reform, and not the changes in the position of the EP, will be the focus of this book. Declaration No. 23, annexed to the Nice Treaty, first invited national parliaments to participate in the debate on the future of the EU. Next, the European Council, meeting in Laeken on 15 December 2001, adopted a Declaration on the Future of the European Union that pointed towards a new role for national parliaments.<sup>283</sup> Specifically, under the heading of 'better division and definition of competence in the European Union', the Declaration asked the question of 'how is the principle of subsidiarity to be applied here?', also making sure that a new division of competences would not cause a 'creeping expansion of the competence of the Union' or encroach upon the exclusive competences of Member States or regions.<sup>284</sup> In the section on democracy, transparency, and efficiency in the EU, the Declaration posed questions

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<sup>280</sup> See Alexander Trechsel, 'The Nationalization and Europeanization of European Elections, 30 June 2014' <<https://www.eui.eu/DepartmentsAndCentres/RobertSchumanCentre/Opinions/3006Trechsel>> . For a more critical view see ibid Joseph H. H. Weiler, 'Fateful Elections? investing in the Future of Europe,' (2014) 12 International Journal Of Constitutional Law 273.

<sup>281</sup> Peter Lindseth, 'Delegation is Dead, Long Live Delegation: Managing the Democratic Disconnect in the European Market-Polity' in Christian Joerges and Renaud Dehousse (eds), *Good Governance in Europe's Integrated Market* (Oxford University Press 2002) 151

<sup>282</sup> Ibid.

<sup>283</sup> Laeken Declaration. For the critical appraisal of the post-Laeken reforms, see Garreth Davies, 'The post-Laeken division of competences' (2003) 28 European Law Review 686, 695.

<sup>284</sup> Laeken Declaration, 22.

about the role of national parliaments, namely, whether they should be represented in a new institution and whether they should concentrate on the question of division of competences between the EU and the Member States. As an example of this function, the Declaration put forward an idea of a preliminary check concerning compliance with the subsidiarity principle.<sup>285</sup> To answer these and other questions, the European Council decided to convene the Convention on the Future of Europe.<sup>286</sup>

### **C. Alternative Proposals**

The Convention set to deal with both the issue of ‘competence creep’ and the issue of the ‘democratic deficit’. Following the indications of the Laeken Declaration, the Convention established two separate working groups, one dedicated to the subsidiarity principle (Working Group I) and one to the role of national parliaments (Working Group IV).

Working Group I discussed a number of institutional ideas for the protection of the subsidiarity principle. The ‘political monitoring’ possibilities studied by Working Group I included the creation of ‘a Mr (or Ms) “subsidiarity” to assist each member of the European Council and the European Parliament, with verifying and giving a timely opinion on the compliance of proposals the principle of subsidiarity’.<sup>287</sup> At a later stage, a position of a ‘Mr (or Ms) subsidiarity’ within the Commission, or of a Vice-President of the Commission, ensuring the compliance of proposals with subsidiarity, was discussed.<sup>288</sup> In this case, it was decided, however, that every Commissioner should be responsible for compliance with the subsidiarity principle in the areas under his or her competence, in addition to the Commission’s own competence to decide on its internal organisation.<sup>289</sup> Another option was the creation of an ad hoc institution consisting of national parliamentary representatives, a proposal which, however, at later stages of the debates, was perceived rather negatively.<sup>290</sup> The creation of an ad hoc body was ruled out as too cumbersome for the decision-making process.<sup>291</sup>

The ‘legal monitoring’ options included the creation of an ad hoc ‘subsidiarity chamber’ within the CJEU.<sup>292</sup> However, Working Group I concluded that the Court could take such an

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<sup>285</sup> Ibid at 23.

<sup>286</sup> Ibid at 24.

<sup>287</sup> European Convention, Mandate of the Working Group on the principle of subsidiarity, CONV 71/02, 30.05.2002, CONV 71/02, 4.

<sup>288</sup> European Convention, Summary of the Meeting of 17 June 2002, CONV 106/02, 2.

<sup>289</sup> European Convention, Conclusions of Working Group I on the Principle of Subsidiarity, CONV 286/02, 5.

<sup>290</sup> European Convention, Summary of the Joint Meeting on Monday 22 July 2002, CONV 210/02, 2.

<sup>291</sup> CONV 286/02, 2.

<sup>292</sup> CONV 71/02, 5.



organisational measure itself.<sup>293</sup> Moreover, Working Group I also pondered establishing an *ex ante* judicial mechanism, between the adoption of the EU legislative act and its entry into force, inspired by provisions of the Member States for monitoring the constitutionality of laws.<sup>294</sup> In fact, the vision of creating a Constitutional Council for the Community as an equivalent to the French Conseil Constitutionnel had been proposed much earlier. Such a constitutional council ‘would have jurisdiction only over issues of competences (including subsidiarity) and would decide cases submitted to it after a law was adopted, but before coming into force’.<sup>295</sup> Their project put forward that any Community institution, Member State, or the majority of EP could bring such an action. The constitutional council would consist of the president of the CJEU and members of Member States’ constitutional courts. However, Working Group I abandoned the idea of a constitutional council, as in the view of the group, the introduction of a judicial review during the legislative phase would lead to the loss of the political nature of the subsidiarity review.<sup>296</sup> In addition, granting such powers was perceived as problematic, as the CJEU would control subsidiarity at a different stage than conferral or proportionality principles.<sup>297</sup>

None of the ideas above has been given a ‘green light’. Both working groups concluded that national parliaments should be granted a competence to review the subsidiarity principle.<sup>298</sup> Working Group I offered three guidelines on the control of the subsidiarity principle. First, EU institutions should reinforce their scrutiny of the subsidiarity principle during the drafting and examination of proposals. Second, an ‘early warning system’, with a role for national parliaments, should be created; and third, an opportunity for ex-post referral to the Court of Justice on subsidiarity issues should be provided.<sup>299</sup> It was thus proposed, in agreement with Working Group IV, that national parliaments would be involved in the EU legislative procedure ‘for the first time in the history of European construction’ through a process of monitoring of the subsidiarity principle.<sup>300</sup> While putting all national parliaments on an ‘equal footing’, the system did not make the procedure more cumbersome and did not create any new bureaucracy.<sup>301</sup> Both the EWS and the possibility to bring a subsidiarity action before

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<sup>293</sup> CONV 286/02, 8.

<sup>294</sup> CONV 286/02, 9

<sup>295</sup> Joseph H. H. Weiler, Ulrich R Haltern and Franz C Mayer, ‘European democracy and its critique’ (1995) 18 West European Politics 4, 38.

<sup>296</sup> CONV 286/02, 9.

<sup>297</sup> Ibid. For criticism of the idea of subsidiarity monitoring between the moments of adoption and entry into force (in the manner of the French Conseil Constitutionnel), see the opinion of AG Jacobs given to Working Group I: European Convention, Summary of the Meeting on 25 June 2002, CONV 156/02, 3-4.

<sup>298</sup> European Convention, Summary of the joint meeting on 22 July 2002, CONV 210/02, 30.07.2002, 1.

<sup>299</sup> CONV 286/02, 3.

<sup>300</sup> CONV 286/02, 5.

<sup>301</sup> CONV 286/02, 6.

the Court were seen as a ‘process-based approach’ in contrast to creation of a new institution.<sup>302</sup> The enhanced involvement of national parliaments was seen as a way to strengthen the EU’s democratic legitimacy and ‘bring it closer to the citizens’.<sup>303</sup>

The EWS was finally introduced by the Lisbon Treaty after the failure of the Constitutional Treaty. The subsidiarity review places itself between the national level and the EU level, allowing national parliaments to contribute to the EU constitutional order, not confining their role to the national level, as in the case of scrutiny of the government in EU affairs, but broadening it to the EU arena. In this sense, the subsidiarity review also avoids identifying the democratic deficit in only one institution (eg, the Council) and transferring the decision-making to an alternative institution (eg, the EP). In contrast, improving only the national level as a point of reference could have been perceived as unsatisfactory, because the democratic deficit may also affect the Member States themselves (eg, as they often also do not fulfil the ‘democratic and constitutional ideals of full representation and participation’).<sup>304</sup>

For its purpose as a democratic safeguard, the subsidiarity review provides for an interaction between national parliaments and EU institutions, predominantly the Commission. The legislative act created in this process captures the involvement of the national and European polity. To tackle the ‘competence creep’ within the EU, the EWS offers checks on any tendency of the EU to take shared competences away from the Member States.

## **VII. Conclusion**

This chapter set out to offer an analysis of the subsidiarity principle. This principle was provided already in the papal encyclical and in German federalism and liberalism. As a constitutional principle, subsidiarity was found first in German Basic Law. The study of subsidiarity in Switzerland and the US, as the question central to the organisation of federal systems, has shown that the degree to which other systems rely on that principle varies significantly. Nonetheless, subsidiarity was then taken as a role model by the EU legal order, first in the Maastricht Treaty and then in the Lisbon Treaty. The guidelines for the application of the subsidiarity principle established in the ‘Overall Approach’ and in the Amsterdam Protocol attempted to provide tangible contours to the ‘national insufficiency’ and the

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<sup>302</sup> European Convention, Final Report of Working Group IV on the role of national parliaments, CONV 353/02, 11.

<sup>303</sup> CONV 353/02, 2.

<sup>304</sup> Miguel Poiarés Maduro, ‘Europe and the Constitution: what if this is as good as it gets?’ in Joseph H.H. Weiler and Marlene Wind (eds), *European Constitutionalism beyond the State* (Cambridge University Press 2003) 84.

‘comparative efficiency’ tests. In fact, they provide assistance in the enforcement of that principle for EU institutions and national parliaments alike. The most promising have, however, been the impact assessments and other tools of procedural subsidiarity. They offer help in avoiding the ‘empty formulas’ in the justification of compliance of EU legislative proposals and adopted acts with the subsidiarity principle. This chapter has also discussed the relationship between this principle and the principles of conferral and proportionality. The structure of Article 5(3) TEU analysed here is important for the boundaries of the review of the subsidiarity principle by the national parliaments, discussed in detail in Chapter 3. Yet, before the focus of this book became national parliaments, this chapter offered a recap of the flaws in the subsidiarity case law of the Court already established in the relevant literature. Additionally, this chapter pointed out some new tendencies in the jurisprudence of the Court such as the focus on the cross-border elements of EU action and the reference to impact assessments. The ‘subsidiarity action’ enshrined in Protocol No. 2 might offer a new source of subsidiarity case law in future. Nonetheless, as such, the subsidiarity jurisprudence of the Court, which is so often criticised for not taking subsidiarity seriously, did not seem to have changed substantially. This aspect, together with the problem of broadening the EU competence and the insufficient democratic legitimacy of the EU actions, in light of the lack of another suitable mechanism to answer to those critical points, led to the establishment of the EWS, to be discussed in detail in the next chapter.